Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Application by Verizon New England Inc.,	)	
Bell Atlantic Communications, Inc. (d/b/a	)	CC Docket No. 01-324
Verizon Long Distance), NYNEX Long	)	
Distance Company (d/b/a Verizon Enterprise	)	
Solutions), Verizon Global Networks Inc.,	)	
and Verizon Select Services Inc., for	)	
Authorization To Provide In-Region,	)	
InterLATA Services in Rhode Island	)	

MEMORANDUM OPINION AND ORDER

Adopted: February 22, 2002 **Released:** February 22, 2002

By the Commission: Commissioner Copps concurring and issuing a statement; Commissioner Martin approving in part, concurring in part, and issuing a statement.

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I. INTRODUCTION

1. On November 26, 2001, Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc. (Verizon) filed this application pursuant to section 271 of the Communications Act of 1934, as amended,[1] for authority to provide in-region, interLATA service originating in the State of Rhode Island and Providence Plantations (Rhode Island). We grant the application in this Order based on our conclusion that Verizon has taken the statutorily required steps to open its local exchange markets in Rhode Island to competition.

2. According to Verizon, competing carriers in Rhode Island serve approximately 119,000 lines (counting competitive lines served by resale, unbundled network elements, and competitive LEC facilities), or nearly 16 percent of the total access lines in the state.[2] Across the state, competitors serve approximately 94,000 lines using unbundled network elements or their

[1] We refer to the Communications Act of 1934, as amended by the Telecommunications Act of 1996 and other statutes, as the Communications Act, or the Act. *See* 47 U.S.C. §§ 151 *et seq*. We refer to the Telecommunications Act of 1996 as the 1996 Act. *See* Telecommunications Act of 1996, Pub. L. No. 104-104, 110 Stat. 56 (1996).

[2] *See* Letter from Clint E. Odom, Director - Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Dec. 11, 2001) (clarifying information contained in Verizon Application, App. A, Vol. 3, Tab F, Local Competition in Rhode Island (Verizon Local Competition Report)) (Verizon Dec. 11 *Ex Parte* Letter) and Letter from Clint E. Odom, Director – Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Dec. 20, 2001) (providing retail line counts for Verizon Rhode Island and clarifying information contained in Verizon Local Competition Report) (Verizon Dec. 20 *Ex Parte* Letter) (*citing confidential portion*); *see also* Letter from Clint E. Odom, Directory - Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Jan. 25, 2002) (attaching Declaration of Paula L. Brown).

own facilities, and approximately 25,000 lines through resale.[3] Almost 38 percent of competitors' lines are residential.[4]

3. In granting this application, we wish to recognize the hard work of the Rhode Island Public Utilities Commission (Rhode Island Commission) in laying the foundation for approval of this application. The Rhode Island Commission has conducted proceedings concerning Verizon's section 271 compliance, which have been open to participation by all interested parties. In addition, the Rhode Island Commission has adopted a broad range of performance measures and standards as well as a Performance Assurance Plan designed to create a financial incentive for post-entry compliance with section 271. As the Commission has recognized previously, state proceedings such as these serve a vitally important role in the section 271 process.

II. BACKGROUND

4. In the 1996 amendments to the Communications Act, Congress required that the BOCs demonstrate compliance with certain market-opening requirements contained in section 271 of the Act before providing in-region, interLATA long distance service. Congress provided for Commission review of BOC applications to provide such service in consultation with the affected state and the Attorney General.[5]

5. We rely heavily in our examination of this application on the work completed by the Rhode Island Commission. Beginning in 1997, the Rhode Island Commission began what would become a four and one-half year series of proceedings to set rates for unbundled network elements (UNEs).[6] The Rhode Island Commission also conducted an extensive proceeding, which was open to participation by all interested parties, to facilitate competition in local exchange markets, starting with a docket opened in September of 2000 to establish carrier-to-

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[3] *See* Verizon Dec. 11 *Ex Parte* Letter and Verizon Dec. 20 *Ex Parte* Letter.

[4] *See* Verizon Dec. 11 *Ex Parte* Letter and Verizon Dec. 20 *Ex Parte* Letter.

[5] The Commission has summarized the relevant statutory framework in prior orders. *See, e.g.*, *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6241-42, paras. 7-10 (2001) (*SWBT Kansas/Oklahoma Order*), *aff'd in part*, *remanded in part sub nom. Sprint Communications Co. v. FCC*, No. 01-1076 (D.C. Cir. Dec. 28, 2001); *Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region, InterLATA Services in Texas*, Memorandum Opinion and Order, 15 FCC Rcd 18354, 18359-61, paras. 8-11 (2000) (*SWBT Texas Order*); *Application by Bell Atlantic New York for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Service in the State of New York*, Memorandum Opinion and Order, 15 FCC Rcd 3953, 3961-63, paras. 17-20 (1999) (*Bell Atlantic New York Order*), *aff'd*, *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000).

[6] A more detailed history of the UNE pricing proceeding is provided below. *See infra* Part III.A.1.a.

carrier wholesale performance measurements standards.[7] In that proceeding, the Rhode Island Commission adopted a Performance Assurance Plan (PAP) modeled on the plan in use in New York, and also adopted performance measures based on the measures in use in New York.[8] On July 25, 2001, Verizon made a compliance filing for section 271 approval with the Rhode Island Commission.[9] On December 14, 2001, the Rhode Island Commission recommended that the Federal Communications Commission (the Commission) grant Verizon's application for authorization to provide in-region, interLATA services in Rhode Island.[10] Specifically, the Rhode Island Commission found that Verizon met the requirements of each of the 14 competitive checklist items contained in section 271 of the Act.[11] Additionally, the Rhode Island Commission found that Verizon complied with section 271(c)(1)(A) because Verizon has entered into over 100 binding interconnection agreements with unaffiliated competitive LECs and local exchange service is being provided to both business and residential customers by at least one unaffiliated competitive LEC.[12] Finally, the Rhode Island Commission found that approval of Verizon's section 271 application by the Commission is in the public interest.[13]

6. The Department of Justice recommends approval of Verizon's application for section 271 authority in Rhode Island, stating that:

> While there is significantly less competition to serve customers by means of the UNE-platform, the Department does not believe there are any material non-price obstacles to competition in Rhode Island. Verizon has submitted evidence to show that its [operations support systems] in Rhode Island are the same as those in Massachusetts, and that aspects of its [operations support systems] that were not tested in Massachusetts are generally satisfactory in Rhode Island. Moreover, there have been few complaints regarding Verizon's Rhode Island [operations support systems].[14]

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[7] Rhode Island PUC, *Verizon-Rhode Island's Proposed Carrier-to-Carrier Performance Standards and Reports and Performance Assurance Plan for Rhode Island*, Report and Order, Docket Nos. 3195 & 3256 (rel. Dec. 3, 2001) at 1-2 (*Rhode Island PUC C2C and PAP Order*).

[8] *See id.*; Verizon Application App. A, Vol. 3, Tab C, Joint Declaration of Elaine M. Guerard, Julie A. Canny, and Beth A. Abesamis at paras. 27-30 (Verizon Guerard/Canny/Abesamis Decl.).

[9] The Rhode Island Commission concludes this proceeding with comments filed in this docket. *See* Rhode Island Commission Comments at 4-8.

[10] Rhode Island Commission Comments at 2.

[11] *Id.* at 189.

[12] *Id.* at 9-10.

[13] *Id.* at 189.

[14] Department of Justice Evaluation at 6 (footnote omitted).

While the Department of Justice does not believe that there exist non-price obstacles to competition in Rhode Island, it notes that several commenters raised issues about pricing in Rhode Island and "urges the Commission to look carefully at these comments in determining whether Verizon's prices are cost-based."[15] The Department "recommends approval of Verizon's application for Section 271 authority in Rhode Island, subject to the Commission satisfying itself as to . . . pricing issues."[16] We give "substantial weight" to the Department's evaluation, as required by section 271(d)(2)(A).[17]

7. Before evaluating Verizon's compliance with the requirements of section 271, however, we discuss why we accord evidentiary weight to rate reductions that Verizon filed on day 80. The Commission maintains certain procedural requirements governing BOC section 271 applications.[18] In particular, the "complete-as-filed" requirement provides that when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight in determining section 271 compliance.[19] We maintain this requirement to afford interested parties a fair opportunity to comment on the BOC's application, to ensure that the Attorney General and the state commission can fulfill their statutory consultative roles, and to afford the Commission adequate time to evaluate the record.[20] The Commission can waive its procedural rules, however, "if special circumstances warrant a deviation from the general rule and such deviation will serve the public interest."[21]

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15 *Id.* at 6.

16 *Id.* at 2.

17 47 U.S.C. § 271(d)(2)(A).

18 *See Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (*Mar. 23, 2001 Public Notice*); *Application of Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc. for Authorization To Provide In-Region, InterLATA Services in Pennsylvania*, Memorandum Opinion and Order, 16 FCC Rcd 17419, 17472-73, para. 98 (2001) (*Verizon Pennsylvania Order*); *Application of Verizon New York Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks Inc., for Authorization to Provide In-Region, InterLATA Services in Connecticut*, Memorandum Opinion and Order, 16 FCC Rcd 14147, 14163-64, paras. 34-38 (2001) (*Verizon Connecticut Order*); *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247-50, paras. 20-27; *Bell Atlantic New York Order*, 15 FCC Rcd at 3968-69, paras. 32-37; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, To Provide In-Region, InterLATA Services in Michigan*, Memorandum Opinion and Order, 12 FCC Rcd 20543, 20570-76, paras. 49-59 (1997) (*Ameritech Michigan Order*).

19 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6247, para. 21.

20 *See Ameritech Michigan Order*, 12 FCC Rcd at 20572-73, paras. 52-54.

21 *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990); *WAIT Radio v. FCC*, 418 F.2d 1153 (D.C. Cir. 1969); *see also* 47 U.S.C. § 154(j); 47 C.F.R. § 1.3.

8. We waive the complete-as-filed requirement on our own motion pursuant to section 1.3 of the Commission's rules[22] to the extent necessary to consider rate reductions filed by Verizon on day 80 of the 90-day period for Commission review of the Rhode Island application.[23] We conclude that the special circumstances before us here warrant a deviation from the general rules for consideration of late-filed information or developments that take place during the application review period. In particular, as we discuss below, we find that the interests our normal procedural requirements are designed to protect are not affected by our consideration of these late-filed rate reductions. In addition, we also conclude that consideration of the rate reductions will serve the public interest. We will continue to enforce our procedural requirements in future section 271 applications, however, in the absence of such special circumstances, in order to ensure a fair and orderly process for the consideration of section 271 applications within the 90-day statutory deadline.

9. There are special circumstances here that satisfy the first element of the test for grant of a waiver described above. Indeed, the circumstances are unique, and, based on our experience in reviewing over a dozen section 271 applications, we expect that they will not recur. First, at the time Verizon filed its application with us on November 26, 2001, the UNE rates that were in effect in New York served as a legitimate benchmark comparison by which Verizon might demonstrate that its Rhode Island rates were TELRIC-compliant.[24] Yet on January 28, 2002 – day 63 of our review of Verizon's Rhode Island application – the New York Public Service Commission (New York Commission) resolved a long-standing dispute by lowering Verizon's switching rates in that state by approximately 50 percent.[25] Commenters asserted that the old New York rates could no longer serve as a benchmark from which to judge whether Verizon's rates in Rhode Island were TELRIC-compliant.[26] Indeed, AT&T suggested in

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[22] 47 C.F.R. § 1.3.

[23] *See* Letter from Dee May, Assistant Vice President - Federal Regulatory, Verizon, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 01-324 (Feb. 14, 2002) (attaching Rhode Island revised tariff filing) (Verizon Feb. 14 *Ex Parte* Letter); Public Notice, *Comments Requested in Connection with Verizon's Section 271 Application for Rhode Island*, CC Docket No. 01-324, DA 02-356 (rel. Feb. 14, 2002) (Feb. 14 Public Notice).

[24] As we explain in more detail *infra* part III.A.1.b(ii), when a state commission does not apply TELRIC principles or does so improperly, then we will look at whether a comparison of the rates in the applicant state to rates that were approved in other section 271 applications nonetheless evidences that the applicant's rates fall within the range that a reasonable TELRIC-based rate proceeding would produce. *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276-78, paras. 82-84. We note that there was considerable dispute in the record regarding whether Verizon's rates as originally filed would satisfy a benchmark comparison to the rates in effect in New York at that time. Because the New York Commission has modified its rates, we need not resolve this dispute with respect to the rates that are no longer in effect.

[25] New York PSC, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-1357, Order on Unbundled Network Element Rates (rel. Jan 28, 2002).

[26] Letter from Robert W. Quinn, Jr., Vice President, Federal Government Affairs, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 01-324 (Feb. 12, 2002); Letter from Robert W. Quinn, Jr., Vice President, Federal Government Affairs, AT&T, to William F. Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 01-324 (Feb. 1, 2002) (AT&T Feb. 1 *Ex Parte* Letter); (continued….)

an *ex parte* presentation on February 1, 2002, that this Commission could only grant Verizon's Rhode Island application if Verizon lowered its rates in Rhode Island to New York levels.[27] In response, Verizon filed reduced rates with the Rhode Island Commission, and filed with us evidence that it had done so.[28] This unique change in circumstances – the New York Commission's long-awaited decision to modify Verizon's switching rate – was not within Verizon's control. Verizon could not have known either when the New York Commission would lower rates in that state or the exact rates that the New York Commission would adopt. Thus, this is not a situation where a BOC has attempted to maintain high rates only to lower them voluntarily at the eleventh hour in order to gain section 271 approval. Rather, this is a situation where a core element of the BOC's evidence in support of its section 271 filing changed outside of its control, and the BOC promptly took affirmative steps to adjust its showing to demonstrate compliance with section 271.

10. Second, the rate changes at issue are limited. Verizon lowered only its port and switching usage rates.[29] Verizon has not modified the rate structure or implemented a combination of decreases and increases. As a result, addressing the effect of this rate reduction placed a limited additional analytical burden on the Commission staff and commenting parties, in contrast to the burden that would have been caused by the consideration of more complex rate revisions. Moreover, Verizon's rate reductions have already taken effect,[30] so there is no concern that the Commission is approving a "promise[] of future performance."[31] Nor is this a situation where the BOC implements measures (such as changes to its OSS) designed to achieve nondiscriminatory performance in the applicant's provision of service to competitive LECs, the effectiveness of which would be difficult to measure in advance.

11. Third, interested parties have had an opportunity to evaluate the new rates and to comment. Numerous parties had already commented or made *ex parte* filings regarding Verizon's Rhode Island rates as compared with existing and proposed New York rates, and then

(Continued from previous page)
Letter from Keith L. Seat, Senior Counsel, WorldCom, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (Jan. 31, 2002) (WorldCom Jan. 31 *Ex Parte* letter); Letter from Clint E. Odom, Director - Federal Regulatory, Verizon, to Commissioner Kathleen Q. Abernathy, Federal Communications Commission, CC Docket No. 01-324 (Feb. 8, 2002) (Verizon Feb. 8 *Ex Parte* Letter).

[27] AT&T Feb. 1 *Ex Parte* Letter, at 16 ("Thus, even under Verizon's view of the NYPSC decision, the Commission cannot grant an application on February 24, 2002 unless it finds that Verizon will reduce Rhode Island rates to the New York levels no later than March 1, 2002.").

[28] *See* Verizon Feb. 14 *Ex Parte* Letter.

[29] Verizon Feb. 14 *Ex Parte* Letter. The rates for reciprocal compensation, which are based on these switching rates, are also correspondingly reduced. *See id.* Attach. at 2.

[30] *See* Letter from Clint E. Odom, Director - Federal Regulatory, Verizon, to William Caton, Acting Secretary, Federal Communications Commission, CC Docket No. 01-324 (Feb. 21, 2002) (attaching Rhode Island PUC, *Unbundled Local Switching and Analog Line Port Rates - Verizon Rhode Island's Section 271 Compliance Filing*, Docket No. 3363, Order (rel. Feb. 21, 2002) (*Second Rhode Island Switching Order*)).

[31] *Ameritech Michigan Order*, 12 FCC Rcd at 20573, para. 55 (emphasis omitted).

on the effect of the New York Commission's reduction of rates, even prior to Verizon's filing of its new rates in Rhode Island.[32] Thus, it was not unduly burdensome for commenters to respond to Verizon's actual reduction of a limited number of rates in a relatively short period of time. Moreover, the very limited nature of these rate changes has permitted the Commission staff to evaluate the change within the 90-day review period. In addition, the Rhode Island Commission approved the new rates expeditiously and made them effective February 20, 2002.[33] The Department of Justice did not comment on the rates, but in its initial comments states that "'[b]ecause of the Commission's experience and expertise in rate-making issues . . . the Department will not attempt to make its own independent determination whether prices are appropriately cost-based.'"[34] Because the Commission and commenters have had sufficient time and information to evaluate Verizon's application, we see no need to restart the 90-day clock.[35]

12. Finally, in this instance Verizon has responded to criticism in the record by taking positive action that will foster the development of competition. This is very different from the situation in which late-filed material consists of additional arguments or information concerning whether current performance or pricing satisfies the requirements of section 271. In addition, this application is otherwise persuasive and demonstrates a commitment to opening local markets to competition as required by the 1996 Act.

13. We also conclude that grant of this waiver will serve the public interest and thus satisfy the second element of the waiver standard described above. In particular, grant of this waiver permits the Commission to act on this section 271 application quickly and efficiently without the delays inherent in restarting the 90-day clock. Grant of this waiver also serves to credit Verizon's decision to respond positively to criticism in the record concerning its rate levels by making pro-competitive rate reductions. Given that interested parties have had an opportunity to comment on these rate reductions, we do not believe that the public interest would be served in this instance by strict adherence to our procedural rules. Nor do we need to delay the effectiveness of this Order, as we did in the *SWBT Kansas/Oklahoma Order*.[36] In contrast to that situation, here the New York Commission dictated the timing by its resolution of the long-pending rate proceeding. As we have made clear above, however, we do not intend to allow a pattern of late-filed changes to threaten the Commission's ability to maintain a fair and orderly process for consideration of section 271 applications.

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[32] *See supra* n.26; ASCENT Comments at 6-9; AT&T Comments at 15; WorldCom Comments at 9-10.

[33] *See Second Rhode Island Switching Order* at 3.

[34] *See* Department of Justice Evaluation at 6 (quoting Evaluation of the Department of Justice, in *Joint Application by SBC Communications, Inc. et al. for Provision of In-Region InterLATA Services in Kansas and Oklahoma*, CC Docket No. 00-207 (Dec. 4, 2001)).

[35] *See* AT&T Supp. Comments at 2 & n.1, 3 & n.2.

[36] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6249, para. 26, 6263, para. 52, 6270, para. 72. We disagree with AT&T that delaying the effectiveness of section 271 authorization is an ineffective deterrent and remedy for violation of the complete-as-filed rule, but we do not invoke that remedy here because, as described above, Verizon was not engaging in gamesmanship by resisting rate reductions.

14. Under the unique circumstances presented in this application, we cannot agree with the commenting parties – AT&T and ASCENT – that urge us to decline to consider these rate revisions or to treat these revisions as a new filing that starts a new 90-day review period.[37] First, we note that neither commenter even suggested that Verizon's modified switching rates for Rhode Island do not benchmark favorably against the new New York rates, or that the new New York rates are not TELRIC-compliant. To the contrary, AT&T has urged the Commission to do exactly what it is doing – benchmarking Verizon's Rhode Island rates against the new New York rates.[38] Rather than address the outcome on this point, parties' comments focused on the process the Commission ought to use in conducting its proceeding.

15. With respect to the parties' process arguments, we disagree that consideration of these rate reductions permits Verizon to game the process, and benefit by delaying the opening of its local market in Rhode Island to UNE-based competition.[39] As explained above, we do not hold Verizon responsible for the timing of the New York Commission's order lowering rates, and note that Verizon responded very quickly to seek a corresponding rate reduction in Rhode Island. Moreover, we disagree with ASCENT's suggestion that the Commission must deny this waiver request to allow time to measure the impact of the new rates on competition.[40] The statute simply does not require such an analysis, or require that a BOC demonstrate that it has been in compliance with section 271 for any period of time before it files a section 271 application.[41]

16. Second, we disagree that the Commission and interested parties had too little time to analyze Verizon's reduced switching rates, and that parties had too little time to prepare comments.[42] As explained above, Verizon's rate reductions were limited and straightforward, and required only to be compared with the new switching rates for New York. Indeed, parties had already made a preliminary comparison in their earlier comments and *ex parte* presentations.[43] Moreover, no party has asserted that, given more time, it would even seek to demonstrate that Verizon's switching rates in New York or Rhode Island are not TELRIC-compliant.[44] We also disagree with AT&T that it could not file meaningful comments without

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37 *See* ASCENT Supp. Comments at 2, 6-14; AT&T Supp. Comments at 2 & n.1, 3 & n.2.

38 *See* AT&T Feb. 1 *Ex Parte* Letter at 16; *see also* AT&T Comments at 15 (comparing Verizon's Rhode Island switching rates to rates recommended by ALJ in New York).

39 *See* AT&T Supp. Comments at 2-3; ASCENT Supp. Comments at 8-9.

40 *See* ASCENT Supp. Comments at 10-11.

41 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6250, para. 27.

42 *See* AT&T Supp. Comments at 2.

43 *See supra* para. 11 & n.26; *see also infra* part III.A.1.b(ii).

44 As noted previously, AT&T in an earlier filing urged the Commission to benchmark Verizon's Rhode Island rates against its new New York rates. *See* AT&T Feb. 1 *Ex Parte* Letter at 16.

more analysis of, or information about, the derivation of Verizon's lowered rates.[45] As explained in more detail below, our benchmark analysis is a comparison of costs and rates in two states and does not require more than what Verizon placed in the record on February 14.[46]

17. Finally, we share, to some extent, commenters' concerns that incentives may exist for applicants to withhold rate reductions until the eleventh hour.[47] As noted above, however, granting this waiver does not encourage further late filings because the unique circumstance present here resulted from the New York Commission's order modifying Verizon's switching rates. Moreover, notwithstanding the Commission's decision occasionally to waive its general procedural rules governing section 271 applications, where warranted, we believe that our procedural requirements have led to the filing of applications that contain a tremendous amount of detail and are largely complete. The vast amount of evidence that BOCs submit on the day of filing dwarfs the relatively small amount of subsequent evidence we have considered pursuant to waiver.

III. CHECKLIST COMPLIANCE

18. As in recent section 271 orders, we will not repeat here the analytical framework and particular legal showing required to establish compliance with every checklist item. Rather, we rely on the legal and analytical precedent established in prior section 271 orders, and we attach comprehensive appendices containing performance data and the statutory framework for evaluating section 271 applications.[48] Our conclusions in this Order are based on performance data as reported in carrier-to-carrier reports reflecting service in the most recent four months before filing (July through October 2001). Verizon has also submitted November performance data for our review. We elect in this proceeding only to examine November data in a few instances for the limited purpose of supplementing our findings concerning Verizon's performance that is demonstrated by performance data from earlier months. We generally limit our review to performance data filed with the initial application or shortly thereafter, in accordance with our procedural rules for reviewing section 271 applications, although we have considered an additional later month of data in certain circumstances.[49] Limiting our review in this way presents commenters a fuller opportunity to comment on the evidence that the company relies on for its showing, and is administratively more convenient for the Commission.

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[45] *See* AT&T Supp. Comments at 2.

[46] *See infra* part III.A.1.b(ii).

[47] *See* ASCENT Supp. Comments at 10-14; AT&T Supp. Comments at 3.

[48] *See In the matter of Joint Application by SBC Communications Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc., d/b/a/ Southwestern Bell Long Distance Pursuant to Section 271 of the Telecommunications Act of 1996 To Provide In-Region , InterLATA Services in Arkansas and Missouri*, 16 FCC Rcd 20719, 20797-882, Appendices. B, C, and D (2001) (*SWBT Arkansas/Missouri Order*); *Verizon Pennsylvania Order*, 16 FCC Rcd at 17508-45, Appendices B & C.

[49] *See SWBT Texas Order*, 15 FCC Rcd at 18372, para. 39 (considering April 2000 performance data, when application was filed on April 5, 2000, and comments on the application were due on April 26, 2000).

19. We focus in this Order on the issues in controversy in the record. Accordingly, we begin by addressing checklist item two – access to unbundled network elements. Next, we address checklist items one (interconnection), four (unbundled local loops), five (unbundled transport), and fourteen (resale). The remaining checklist items are discussed briefly. We find, based on our review of the evidence in the record, that Verizon satisfies all checklist requirements.

A. Checklist Item 2 – Unbundled Network Elements

1. Pricing of Unbundled Network Elements

a. Background

20. Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions for unbundled network elements to be based on cost and nondiscriminatory, and allows the rates to include a reasonable profit.[50] The Commission's pricing rules require, among other things, that an incumbent LEC provide unbundled network elements based on the TELRIC pricing methodology.[51] Although the United States Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[52] the Supreme Court restored the Commission's pricing authority on January 25, 1999, and remanded to the Eighth Circuit for consideration of the merits of the challenged rules.[53] On remand from the Supreme Court, the Eighth Circuit concluded that, while TELRIC is an acceptable method for determining costs, certain of the Commission's pricing rules were contrary to congressional intent.[54] The Eighth Circuit has stayed the issuance of its mandate[55] pending appeal before the Supreme Court, which has granted

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[50] 47 U.S.C. § 252(d)(1).

[51] *See* 47 C.F.R. §§ 51.501-09.

[52] *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (8th Cir. 1997).

[53] *American Tel. & Tel Co. v. Iowa Utils. Bd.,* 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd*.). In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 380. Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section." *Id.* at 382. The Court also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states. The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result." *Id*.

[54] *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petition for cert. granted sub nom. Verizon Communications v. FCC*, 121 S. Ct. 877, 148 L. Ed.2d 788, 69 USLW 3269, 69 USLW 3490, 69 USLW 3495 (U.S. Jan. 22, 2001).

[55] *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8th Cir. Sept. 25, 2000).

certiorari and recently heard oral argument in the case.[56] Accordingly, the Commission's rules remain in effect for purposes of this application.

21. On November 24, 1997, the Rhode Island Commission began what would become a four and one-half year series of proceedings to set rates for unbundled network elements (UNEs). In these proceedings, the Rhode Island Division of Public Utilities and Carriers (Rhode Island Division), the entity responsible for executing all laws and regulations pertaining to public utilities and carriers, represented Rhode Island ratepayers. A variety of parties participated in the proceedings.[57] Verizon and AT&T filed separate cost studies based on different models in the proceedings.[58] On August 18, 1999, the Rhode Island Commission adopted stipulated, interim rates, that "for the most part reflected the [Rhode Island Division's] position in the . . . proceedings."[59] In general, the Division-recommended, interim rates were lower than the rates Verizon proposed at the beginning of the proceedings. For example, the interim statewide average rate for a two-wire analog loop was $15.00, while Verizon's proposed rate was $21.69.[60]

22. On April 11, 2001, the Rhode Island Commission adopted these interim rates as permanent rates, simultaneously ordering that the rates incorporate a 7.11 percent across-the-board reduction to account for savings from Verizon mergers and process re-engineering occurring since the rate proceeding had begun.[61] In adopting the rates, the Rhode Island Commission found that they were "consistent with the [Commission's] TELRIC methodology and, therefore, will facilitate the development of local telephone exchange competition in Rhode Island."[62] The Rhode Island Commission also ordered Verizon to file new cost studies using certain specific assumptions as part of a new UNE rate proceeding which is scheduled to begin no later than May 1, 2002, and in which the Rhode Island Commission expects to adopt new UNE rates by the end of 2002.[63] The Rhode Island Commission has indicated that it required these new cost studies because it "wanted to receive and review more recent evidence."[64] The

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[56] *Verizon Communications v. FCC*, 121 S. Ct. 877, 148 L. Ed.2d 788, 69 USLW 3269, 69 USLW 3490, 69 USLW 3495 (Jan. 22, 2001).

[57] Rhode Island PUC, *Review of Bell Atlantic-Rhode Island TELRIC Study*, Report and Order at 4, Docket No. 2681 (rel. Nov. 18, 2001) (*Rhode Island TELRIC Order*); Rhode Island Commission Comments at 43; Verizon Application, App. A, Vol. 3, Tab D, Joint Declaration of Donna Cupelo, Patrick Garzillo and Michael Anglin (Verizon Cupelo/Garzillo/Anglin Decl.) at 5, para. 17.

[58] *Rhode Island TELRIC Order* at 4; Verizon Cupelo/Garzillo/Anglin Decl. at 6, para. 19

[59] Rhode Island Commission Comments at 43.

[60] Verizon Cupelo/Garzillo/Anglin Decl. at 7-8, para. 26.

[61] *Rhode Island TELRIC Order* at 5.

[62] *Id*. at 4.

[63] *Id*. at 75-76; Rhode Island Commission Reply at 3.

[64] Rhode Island Commission Reply at 3.

Rhode Island Commission has stated that the new rate proceeding will "in no way affect our conclusion that [Verizon's] currently effective UNE rates are TELRIC-compliant."[65]

23. On November 15, 2001, in a separate proceeding, the Rhode Island Commission adopted discounted switching rates that Verizon had voluntarily proposed in seeking the Rhode Island Commission's approval of its section 271 application.[66] The discounted rates are similar to rates proposed by Verizon in an ongoing Massachusetts rate proceeding and are based on new Verizon cost studies supporting the proposed Massachusetts rates.[67] The Rhode Island Commission reviewed the discounted switching rates and found that, when aggregate UNE rates in Rhode Island were compared to aggregate UNE rates in Massachusetts, the aggregate Rhode Island rates fell within a reasonable TELRIC range.[68] The Rhode Island Commission noted that the discounted rates "are not only lower than Rhode Island's current UNE rates, but also lower than Massachusetts's comparable UNE rates in April 2001 when the [Commission] approved Massachusetts's Section 271 application."[69] The Rhode Island Commission also relied on a showing by AT&T that the new rates would result in a wholesale cost of $25.45 for the UNE-Platform, which is lower than the $28.95 price of Verizon's Unlimited Local Calling Offer.[70]

24. On November 15, 2001, the Rhode Island Commission also adopted permanent rates for sixteen additional elements identified as UNEs in our *UNE Remand Order*.[71] Verizon had proposed these rates on September 29, 2000, and revised them on May 24, 2001 to reflect the modified, TELRIC-compliant assumptions and 7.11 percent reduction mandated by the Rhode Island Commission on April 11, 2001.[72] After discovery and testimony, the Rhode Island Commission reviewed the rates and found them to be within a reasonable range of rates that a

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65 Rhode Island Commission Comments at 43, n.138; *see also* Rhode Island PUC, *Verizon-Rhode Island's TELRIC Studies-UNE Remand*, Report and Order at 15, Docket No. 2681 (rel. Dec. 3, 2001) (*Rhode Island UNE Remand Order*).

66 Rhode Island PUC, *Unbundled Local Switching Rate Verizon-Rhode Island's Section 271 Compliance Filing*, Report and Order at 2, Docket No. 3363 (rel. Nov. 28, 2001) (*Rhode Island Switching Order*); Rhode Island Commission Comments at 42; Verizon Cupelo/Garzillo/Anglin Decl. at 10, para. 37.

67 Rhode Island Commission Comments at 42; Verizon Cupelo/Garzillo/Anglin Decl. at 10-11, para. 38.

68 *Rhode Island Switching Order* at 4-5.

69 *Rhode Island Switching Order* at 5; *see also* Rhode Island Commission Comments at 42.

70 *Rhode Island Switching Order* at 5-6 (citing Rhode Island PUC, *Unbundled Local Switching Rates Verizon-Rhode Island's Section 271 Compliance Filing*, AT&T Post Hearing Brief at 7-8, Docket No. 3363 (Nov. 2, 2001)).

71 *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Third Report and Order and Fourth Further Notice of Proposed Rulemaking, 15 FCC Rcd 3696 (1999) (*UNE Remand Order*).

72 *Rhode Island UNE Remand Order* at 4.

correct application of TELRIC principles would produce.[73] These rates are not contested in this proceeding.

25. On January 28, 2002, the New York Public Service Commission (New York Commission) concluded a complex TELRIC rate proceeding begun even before the Commission granted Verizon's application for section 271 approval in New York.[74] The New York Commission adopted significantly reduced UNE rates, including switching rates approximately half of Verizon's prior switching rates in effect when the Commission granted Verizon's petition for section 271 approval in New York.[75] This action significantly affects our conclusions in this proceeding, and is discussed in detail below.

26. On February 21, 2002, also as part of its review of Verizon's section 271 application, the Rhode Island Commission adopted further discounted switching rates voluntarily proposed by Verizon.[76] Verizon proposed these new, lower rates to respond to commenters' criticism of its reliance on rates superseded by the New York Commission's January 28, 2002 to demonstrate that its Rhode Island non-loop rates were within a reasonable TELRIC range. The Rhode Island Commission reviewed the further discounted switching rates and found that they fell within a reasonable TELRIC range.

b. Discussion

27. Based on the evidence in the record, we find that Verizon's Rhode Island UNE rates are just, reasonable, and nondiscriminatory in compliance with checklist item two. The Commission has previously held that it will not conduct a *de novo* review of a state's pricing determinations and will reject an application only if either "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[77] The Rhode Island Commission concluded that Verizon's UNE rates satisfied the requirements of checklist item two.[78] While we have not conducted a *de novo* review of the Rhode Island Commission's pricing determinations, we have followed the urging of the

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[73] *Id*. at 15; s*ee also* Verizon Cupelo/Garzillo/Anglin Decl. at 10, para. 34.

[74] New York PSC, *Proceeding on Motion of the Commission to Examine New York Telephone Company's Rates for Unbundled Network Elements*, Case 98-1357, Order on Unbundled Network Element Rates (rel. Jan. 28, 2002) (*New York UNE Rate Order*). The New York Commission based its order on an Administrative Law Judge's (ALJ's) Recommended Decision released on May 16, 2001. Until the New York Commission's order, the ALJ's recommendations were not final and subject to change.

[75] *Id.*

[76] Rhode Island PUC, *Unbundled Local Switching Rates Verizon-Rhode Island's Section 271 Compliance Filing*, Order at 3, Docket No. 3363 (rel. Feb. 21, 2002) (*Second Rhode Island Switching Order*).

[77] *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6266, para. 59; *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244.

[78] *Rhode Island TELRIC Order* at 4; Rhode Island Commission Comments at 43.

Department of Justice that we look carefully at commenters' complaints regarding UNE pricing.[79] Certain flaws in the Rhode Island Commission's initial TELRIC proceeding preclude us from concluding that Verizon's original, April 11, 2001, UNE rates fall within the reasonable range that correct application of TELRIC principles would produce. Nonetheless, after reviewing Verizon's more recent UNE rates, we conclude that Verizon's Rhode Island UNE rates fall within the reasonable range that correct application of TELRIC principles would produce.

28. We commend the Rhode Island Commission for its prodigious effort to establish TELRIC-compliant rates and note that its orders in the UNE rate proceeding demonstrate a commitment to basic TELRIC principles. After two and one-half years of discovery, briefings, and hearings, which included the examination of competing cost studies filed by Verizon and AT&T, the Rhode Island Commission adopted interim rates that incorporated many of the TELRIC-compliant assumptions recommended by its own Division of Utilities and Carriers.[80] Subsequently it adopted these interim rates as permanent rates,[81] and twice adjusted the permanent switching rates downward in response to criticism that they were too high to be TELRIC-based.[82] Finally, the Rhode Island Commission adopted rates for the sixteen additional elements required by our *UNE Remand Order,* and the TELRIC-compliance of these rates is not contested here.[83]

29. To understand our analysis, it is important to distinguish the various rates adopted over time by the Rhode Island Commission and how we are considering each of them. First, on April 11, 2001, the Rhode Island Commission adopted overall UNE rates after a lengthy proceeding.[84] Verizon contends, and the Rhode Island Commission agrees, that the switching rates contained in these UNE rates, referred to as Verizon's April 11 switching rates, are TELRIC-compliant.[85] Subsequently, Verizon twice voluntarily discounted its switching rates in seeking approval of its section 271 application.[86] The Rhode Island Commission adopted the first discounted switching rates, referred to as the November 15 switching rates, on November 15, 2001.[87] Most recently, the Rhode Island Commission adopted further discounted switching

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79 Department of Justice Evaluation at 6.

80 Rhode Island Commission Comments at 42. Based upon this record, we reject AT&T's claim that the interim rates were "unlitigated." AT&T Comments at 3.

81 *See generally Rhode Island TELRIC Order*.

82 *See Rhode Island Switching Order and Second Rhode Island Switching Order*.

83 *See generally Rhode Island UNE Rate Order*.

84 *Rhode Island TELRIC Order* at 5.

85 Verizon Application at 88, Verizon Cupelo/Garzillo/Anglin Decl. at 10, para. 38; *Rhode Island TELRIC Order* at 5.

86 Verizon Cupelo/Garzillo/Anglin Decl. at 10, para. 38; Verizon Feb. 14 *Ex Parte* Letter.

87 *Rhode Island Switching Order* at 5.

rates, referred to as the February 21 switching rates, on February 21, 2002.[88] Although contending that its April 11 rates are TELRIC compliant, Verizon now alternatively relies on these February 21 switching rates in seeking the Commission's approval of its 271 application in this proceeding. Because Verizon asserts in this proceeding that its April 11 rates were TELRIC-compliant, and because the Rhode Island Commission relied upon its own finding that the April 11 switching rates were TELRIC-compliant in subsequently adopting Verizon's November 15 switching rates,[89] we review certain contested decisions the Rhode Island Commission made regarding the April 11 switching rates. Because the Rhode Island Commission adopted Verizon's February 21 switching rates without a rate proceeding and a thorough record that would allow us to determine whether the faulty assumptions underlying its original rates were corrected, we review the February 21 rates using our benchmark analysis.[90]

30. We find that the Rhode Island Commission properly applied the TELRIC methodology with respect to several issues disputed by the parties. Both AT&T and WorldCom assert that UNE rates in Rhode Island are not TELRIC compliant because they fail to incorporate the specific assumptions mandated by the Rhode Island Commission on April 11, 2001.[91] This assertion is incorrect. For example, the April 11 rates incorporate Commission-prescribed depreciation lives and a 9.5 percent cost of capital.[92] These Rhode Island Division-recommended assumptions are consistent with assumptions the Commission has found to comply with TELRIC principles in reviewing other section 271 applications.[93] Loop rates also incorporate assumptions regarding fill factors that the Division recommended and the Commission has found to be consistent with TELRIC principles.[94] No party has presented arguments or facts in this proceeding which would cause us to find that these assumptions are inconsistent with TELRIC principles as applied to Verizon in Rhode Island.

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88 *Second Rhode Island Switching Order* at 3.

89 *Rhode Island Switching Order* at 5.

90 Where a state has not conducted a TELRIC rate proceeding, its rates may nonetheless be found to be TELRIC compliant if they pass our benchmark test. *See SWBT Missouri/Arkansas Order* at paras. 67-68.

91 AT&T Comments at 3-4 and 6; WorldCom Comments at 3. The assertion by AT&T and WorldCom that the Rhode Island Commission mandated the assumptions is incorrect. The Rhode Island Commission adopted rebuttable presumptions for its upcoming rate proceeding, many of which were recommended by its own Division of Public Utilities and Carriers, or the Rhode Island ratepayer advocate. *Rhode Island TELRIC Order* at 21, 24, and 35; Rhode Island Commission Comments at 43, n.139; Rhode Island Reply at 2; Verizon Cupelo/Garzillo/Anglin Decl. at 16-17, paras. 49, 50.

92 *Rhode Island TELRIC Order* at 24, 21; Rhode Island Commission Comments at 43, n.139; Rhode Island Reply at 2; Verizon Cupelo/Garzillo/Anglin Decl. at 16-17, paras. 49, 50.

93 *See, e.g.*, *Verizon Pennsylvania Order*, 16 FCC Rcd at 17454, para. 57.

94 *See, e.g., Verizon Massachusetts Order*, 16 FCC Rcd at 9007, para. 39; *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6237, paras. 79-80.

31. We disagree with claims by AT&T and WorldCom that Verizon's UNE rates are not TELRIC compliant because the Rhode Island Commission will soon begin a new rate proceeding in which it will reconsider certain assumptions underlying the rates.[95] The fact that the Rhode Island Commission has scheduled a rate proceeding to update existing rates does not, in itself, prove that existing rates are not TELRIC compliant. Indeed, the Commission has recognized that rates may well evolve over time to reflect new information on cost study assumptions and changes in technology, engineering practices, or market conditions.[96] The United States Court of Appeals for the D. C. Circuit agrees:

> [W]e suspect that rates may often need adjustment to reflect newly discovered information, like that about Bell Atlantic's future discounts. If new information automatically required rejection of section 271 applications, we cannot imagine how such applications could ever be approved in this context of rapid regulatory and technological change.[97]

32. Despite the fact that the Rhode Island Commission has demonstrated a commitment to basic TELRIC principles and has correctly applied these principles in many instances, for the reasons discussed below, we cannot find that Verizon has proven that its UNE rates were adopted through a proceeding which correctly applied TELRIC principles in all instances. Therefore, we evaluate Verizon's current Rhode Island UNE rates based upon our benchmark analysis. As discussed below, Verizon's Rhode Island UNE rates pass our benchmark test, and, therefore, satisfy the requirements of checklist item two.

(i) Switching Rates

33. As discussed above, the Rhode Island Commission adopted UNE rates, including switching rates that it found to be TELRIC compliant, on April 11, 2001 after a lengthy rate proceeding. Subsequently, on November 15, 2001, and February 21, 2002, the Rhode Island Commission adopted reduced switching rates that Verizon had voluntarily discounted in seeking approval of its section 271 application. AT&T and WorldCom criticize specific assumptions underlying the April 11 switching rates, and the switching rates adopted November 15, 2001. AT&T and WorldCom's criticisms of these rates prompt us to consider both the Rhode Island rate proceeding underlying the April 11 switching rates, and the Rhode Island Commission's actions in subsequently adopting discounted switching rates.

34. A central issue contested by the parties is the appropriate discount for Verizon's switches. Verizon's Rhode Island switching rates are based on the assumption that it will not replace any switches in Rhode Island, but only expand switch capacity through growth additions to existing switches. Typically, vendors provide greater discounts for new, replacement switches

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95 AT&T Comments at 4; WorldCom Comments at 3-4.

96 *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para. 247.

97 *AT&T Corp. v. FCC,* 22 F.3d 607, 617-18 (D.C. Cir. 2000).

than for growth additions to existing switches. AT&T and WorldCom contend that Verizon's assumption of no new, replacement switches and only growth additions is inconsistent with TELRIC principles.[98] While the Commission has not to date specified an appropriate split between new, replacement switches and growth additions, we strongly question an assumption of only growth additions, as proposed by Verizon and incorporated in the April 11 rates adopted by the Rhode Island Commission. Even if some growth additions may be used in a forward-looking network, the absence of any new switches is inconsistent with the assumption in TELRIC pricing of a forward-looking network built from scratch, given the location of the existing wire centers.[99] Although an efficient competitor might anticipate some growth additions over the long run, rates based on an assumption of all growth additions and no new switches do not comply with TELRIC principles. We also note that the Rhode Island Commission determined that Verizon's assumptions for switch cost recovery in the new UNE rate proceeding will be based on a rebuttable presumption of 90 percent new switches to 10 percent growth additions.[100]

35. We also agree with AT&T and WorldCom that Verizon used a questionable installation factor for its switches. The installation factor is the percentage amount of the original switch price added to the switch price to recover the costs of installation. Specifically, AT&T and WorldCom claim that Verizon's installation factor of more than 60 percent of the switch cost is inflated.[101] Verizon derives this factor from the cost of installing the switch itself rather than having the switch installed by the vendor.[102] The Rhode Island Commission expressed concern regarding Verizon's installation factor, but, because it found the record before it insufficient to establish a new factor, deferred a specific determination to the new rate proceeding.[103] Specifically, the Rhode Island Commission stated: "[T]he Commission is concerned that [Verizon] may not be as efficient in [installing switches] as it could be: perhaps Verizon should consider letting the switch manufacturer install the switch, as do most Bell companies."[104] The Rhode Island Commission further required Verizon to submit substantial additional evidence on its installation costs in the upcoming rate proceeding.[105] Again, although the Rhode Island Commission found that the rates it ultimately adopted were TELRIC compliant, its decision does not provide us with sufficient evidence to conclude that this installation factor accurately reflects cost recovery of an efficient, forward-looking network pursuant to TELRIC principles. We also note that because the installation factor is a multiplier,

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98 AT&T Comments at 8, 12; WorldCom Comments at 5-7.

99 *Local Competition Order*, 11 FCC Rcd at 15848-49, para. 685, 15845, n.1682; *see also* 47 C.F.R. § 51.505.

100 *Rhode Island TELRIC Order* at 35.

101 AT&T Comments at 42-43; WorldCom Comments at 6-7.

102 *Id*.

103 *Rhode Island TELRIC Order* at 36-37.

104 *Id*. at 36.

105 *Id.* at 37-38.

its application to the switch price magnifies the effect of any other problematic assumptions underlying switching rates, such as inaccurate assumptions for new versus growth switch discounts.

36. As discussed above, parties raised serious questions about whether Verizon's April 11 switching rates are TELRIC compliant. Verizon contends that these rates are TELRIC-compliant, but does not rely on them in this proceeding. Rather, Verizon first relied on the voluntarily discounted switching rates adopted by the Rhode Island Commission on November 15, 2001, and now relies on the voluntarily discounted switching rates adopted by the Rhode Island Commission on February 21, 2002. Therefore, because we base our determination of compliance with checklist item two on the February 21 rates, we need not decide the question of whether Verizon's April 11 switching rates are TELRIC compliant here. Verizon's subsequent adoption of discounted switching rates did not result from a rate proceeding with a thorough record that would allow us to determine whether the faulty assumptions underlying its original rates were corrected. We therefore review the switching rates Verizon now relies on to satisfy checklist item two, the February 21 switching rates, using our benchmark analysis.

(ii) Benchmark Analysis

37. States have considerable flexibility in setting UNE rates, and certain flaws in a cost study, by themselves, may not result in rates that are outside the reasonable range that a correct application of our TELRIC rules would produce. Given our findings concerning the assumptions for new versus growth switch discounts and the installation factor underlying Verizon's switching rates, we must determine whether Verizon can show that its voluntarily reduced switching rates nonetheless fall within the range that reasonable application of TELRIC principles would produce by applying our benchmark test.

38. The Commission has stated that, when a state commission does not apply TELRIC principles or does so improperly (e.g., the state commission made a major methodological mistake or used an incorrect input or several smaller mistakes or incorrect inputs that collectively could render rates outside the reasonable range that TELRIC would permit), then we will look to rates in other section 271-approved states to see if the rates nonetheless fall within the range that a reasonable TELRIC-based rate proceeding would produce.[106] To determine whether a comparison is reasonable, the Commission will consider whether the two states have a common BOC; whether the two states have geographic similarities; whether the two states have similar, although not necessarily identical, rate structures for comparison purposes; and whether the Commission has already found the rates in the comparison state to be TELRIC-compliant.[107]

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[106] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82.

[107] *See SWBT Missouri/Arkansas Order* at para. 56; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 63. We note, however, that in the *Verizon Pennsylvania Order*, we found that several of these criteria should be treated as indicia of the reasonableness of the comparison. *Id*. at para. 64. *See also Verizon Massachusetts Order*, 16 FCC Rcd at 9002, para. 28; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6276, para. 82.

39. Verizon here chooses to rely on a benchmark comparison of its rates in Rhode Island to its rates in New York. While we accept Verizon's reliance on New York rates for purposes of this application, we note that in future applications, Verizon and other BOCs are free to rely on benchmark comparisons to rates in other appropriate, section 271-approved states, as described in the preceding paragraph, as evidence that rates in the applicant state satisfy checklist item two. Of course, Verizon and other BOCs may also demonstrate in future applications that their rates result from a state rate proceeding correctly applying TELRIC principles without regard to any benchmark analysis.

40. We consider the reasonableness of loop and non-loop rates separately.[108] Where the Commission finds that the state commission correctly applied TELRIC principles for one category of rates, it will use a benchmark analysis to evaluate the rates of the other category. If, however, there are problems with the application of TELRIC for both loop and non-loop rates, then the same benchmark state must be used for all rate comparisons to prevent an incumbent LEC from choosing for its comparisons the highest approved rates for both loop and non-loop UNEs.[109] In addition, we combine per-minute switching with other non-loop rates such as port, signaling, and transport rates because competing LECs most often purchase them together rather than separately, and because state commissions often differ in determining how to recover certain costs. For example, in some states shared trunk port costs are recovered through a separate rate, while in other states these costs are recovered as part of switching rates.

41. The New York Commission's recent adoption of substantially reduced switching rates[110] has generated some question in this proceeding about which rates to use in performing our benchmark analysis. Verizon claimed at the outset of this proceeding that its November 15 switching rates satisfied checklist item two because they passed a benchmark comparison to its original switching rates in New York and to its Massachusetts switching rates, which are based on its original New York switching rates.[111] When the New York Commission adopted new rates superseding the rates Verizon had relied on, commenters contended that Verizon's reliance on the superseded New York rates had become unreasonable.[112] Verizon then filed the February 21 switching rate reductions with the Rhode Island Commission to address commenters' contentions.

42. First, we find Verizon's reliance on Massachusetts rates for a benchmark comparison to be inappropriate. The Commission found that Verizon's Massachusetts rates satisfied checklist item two based on a benchmark analysis comparing Massachusetts rates to

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[108] *See, e.g., Verizon Pennsylvania Order*, 16 FCC Rcd at 17457, para. 67; *Verizon Massachusetts Order*, 16 FCC Rcd at 9000-02, paras. 23-27. Loop rates consist of charges for the local loop, and non-loop rates consist of charges for switching, signaling, and transport.

[109] *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458, para. 66; *SWBT Missouri/Arkansas Order* at para. 58.

[110] *See generally New York UNE Rate Order*.

[111] Verizon Application at 91; Verizon Cupelo/Garzillo/Anglin Decl. at 17-19, paras. 51-56.

[112] *See* AT&T Feb. 1 *Ex Parte* Letter; WorldCom Jan. 31 *Ex Parte* Letter.

New York rates.[113] To allow section 271 applicants to use benchmark-approved rates in performing a subsequent benchmark analysis would compound any variations from rates in the state found to have correctly applied TELRIC principles in a full rate proceeding. Verizon's reliance on Massachusetts rates is particularly inappropriate when the Commission found that Massachusetts rates satisfied checklist item two based on a benchmark comparison to New York rates that have now been superseded.

43. On December 22, 1999, the Commission granted Verizon's section 271 application in New York, deferring to the New York Commission on the issue of switch discounts and finding that the New York switching rates fell within the reasonable range that a correct application of TELRIC principles would produce.[114] The Commission noted that the New York Commission was reexamining switching prices and would be revising them.[115] The Court of Appeals for the D.C. Circuit agreed with the Commission's analysis, noting both that the New York Commission "has said it will reexamine switching discounts, ordering refunds if appropriate" and that requiring rejection of section 271 applications due to ongoing rate proceedings would cripple the section 271 process.[116]

44. At the time Verizon applied for section 271 approval in Massachusetts, the New York Commission had not yet concluded its reexamination of switching prices. The Commission approved the Massachusetts application, finding that the Massachusetts rates were comparable to New York rates and passed a benchmark analysis.[117] The Commission rejected parties' arguments that the New York switching rates were defective and subject to a reexamination proceeding and, therefore, could not be relied on for a benchmark analysis.[118] The order stated, however, that, depending on the New York Commission's final conclusions, Verizon might be precluded from relying on New York switching rates as a basis for a future benchmark comparison:

> If the New York Commission adopts modified UNE rates, future section 271 applicants could no longer demonstrate TELRIC compliance by showing that their rates in the applicant state are equivalent to or based on the current New York rates, which will have been superseded. Moreover, because Verizon would have us rely on switching rates from the New York proceeding, a decision by the New York Commission to modify these UNE rates may undermine Verizon's reliance on those rates in Massachusetts and

[113] *Verizon Massachusetts Order*, 16 FCC Rcd at 9000, para 23.

[114] *Bell Atlantic New York Order*, 15 FCC Rcd at 4083-84, para. 242; 4084-85, para. 245.

[115] *Id.* at 4085-86, para. 247.

[116] *AT&T Corp. v. FCC*, 220 F.3d at 618.

[117] *Verizon Massachusetts Order*, 16 FCC Rcd at 9000, para. 23.

[118] *Id*. at 9003, para. 31.

its compliance with the requirements of section 271, depending on the New York Commission's conclusions.[119]

45. In an order issued January 28, 2002, the New York Commission completed its reexamination of switching rates, adopting many recommendations of an ALJ who conducted hearings on the issues, and rejecting many exceptions to the ALJ's Recommended Decision.[120] Regarding the contested issue of new versus growth discounts for switches, the New York Commission found that, although switching costs should not be predicated exclusively on new switch discounts, "it has been clear since [early 1999] that relatively deep new switch discounts are not limited to full-scale switch replacements, and there is no basis for agreeing with Verizon that incremental replacement of the system over time would entail growth discounts only."[121] On February 19, 2002, Verizon filed new rates to comply with the New York Commission's order that are approximately 50 percent lower than the original New York switching rates.[122]

46. Given these findings by the New York Commission, AT&T and WorldCom assert that Verizon cannot rely on a benchmark comparison to superseded New York switching rates to establish that its current Rhode Island switching rates are within a reasonable TELRIC range.[123] The Commission previously has held that the existence of a new cost proceeding is insufficient reason to find that a state's existing rates do not satisfy TELRIC principles.[124] We also believe that the existence of a new rate proceeding is insufficient reason to disallow a state's rates for benchmarking purposes. As the Court of Appeals for the D.C. Circuit has recognized, rates require continual adjustment to reflect changing information, and section 271 applications would never be granted if such adjustment required denial.[125] The need for such continual adjustment, however, also requires us to consider carefully any reliance on benchmarking to rates that have

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[119] *Id.* at 9002-03, paras. 29-30. We note that this Commission order was approved by two Commissioners, with one concurrence and one dissent. In his separate statement, Chairman Powell explained the situation as follows: "If New York in fact revises its rates downward after concluding that its prior determinations were not soundly cost-based, neither Verizon nor anyone else could properly rely in future applications on the rates we approved in the *Bell Atlantic New York Order* without new substantiation. Furthermore, depending on the scope of the New York Commission's upcoming decision on rates, this Commission might determine that Verizon has subsequently 'ceased to meet [one] of the conditions required for [section 271] approval,' thereby empowering us to take remedial action under section 271(d)(6)." *Id.* at 9143.

[120] *See generally New York UNE Rate Order*.

[121] *Id*. at 28.

[122] Among other things, the New York Commission adjusted how much of the cost of switching is recovered through the flat-rated port charge and how much is recovered through traffic-sensitive per-minute charges, raising the portion recovered through flat charges and reducing the portion recovered through per-minute charges. *Id*. at 36.

[123] AT&T Feb. 1 *Ex Parte* Letter; WorldCom Jan. 31 *Ex Parte* Letter.

[124] *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para. 247, *aff'd, AT&T Corp. v. FCC*, 220 F.3d at 617.

[125] *AT&T Corp. v. FCC*, 22 F.3d at 617-18.

been superseded by order of a state commission. To do otherwise would be to forever freeze TELRIC ratemaking to the first TELRIC rate proceeding and *de facto* fail to recognize increased sophistication in modeling or newly available evidence that could produce different, more precise TELRIC refinements that result in increased or decreased wholesale prices for UNEs. This requirement is particularly compelling here, where parties questioned Verizon's New York switching rates during the section 271 proceeding and the New York Commission expressly rejected Verizon's discredited claim of no further new switch discounts.[126] We must also consider the experience we have gained in approving additional section 271 applications. We note that Verizon's superseded New York switching rates are considerably higher than other switching rates that the Commission has found to be TELRIC compliant in approving other section 271 applications. For example, Verizon's superseded New York switching rates are significantly higher than switching rates in Texas, Kansas, Oklahoma, Pennsylvania, Missouri and Arkansas.[127] Thus, we conclude that it would be inappropriate to evaluate Verizon's Rhode Island rates based on a benchmark comparison to superseded New York rates.

47. As noted above, in response to criticism of Verizon's use of superseded New York switching rates as evidence that its Rhode Island switching rates fell within a reasonable TELRIC range, Verizon filed new, lower switching rates with the Rhode Island Commission on February 14, 2002.[128] The Rhode Island Commission adopted these new, lower switching rates on February 21, 2002.[129] Verizon maintains that its old Rhode Island switching rates were TELRIC compliant and that its new, lower switching rates are "well below the level that any reasonable measure of TELRIC costs would produce."[130] Verizon's February 21 Rhode Island switching rates compare favorably with the new New York switching rates when evaluated using our benchmark analysis. We consider, therefore, whether the new New York switching rates are an appropriate benchmark for determining whether Verizon's February 21 Rhode Island switching rates fall within a reasonable TELRIC range.

48. We find that the new rates adopted by the New York Commission are appropriate comparison rates in this instance. Several facts unique to this application permit us to use the new New York rates in our benchmark analysis.

49. First, although Verizon did not introduce the deliberations of the New York Commission into the record in this proceeding when it initially filed its Rhode Island section 271 application, the Commission has been aware of the existence of the New York rate proceeding

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126 *New York UNE Rate Order* at 21.

127 *See SWBT Texas Order*, 15 FCC Rcd at 18471-77, paras. 231-242; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6264, para. 55, 6273, para. 73, 6274-75, para. 77; *Verizon Pennsylvania Order*, 16 FCC Rcd at 17458-59, para. 67; *SWBT Missouri Arkansas Order* at paras 60, 67.

128 *See* Verizon Feb. 14 *Ex Parte* Letter; Feb. 14 Public Notice.

129 *Second Rhode Island Switching Order* at 3.

130 Verizon Feb. 14 *Ex Parte* Letter at 2.

since it first granted Verizon section 271 approval in New York.[131] Further, AT&T and WorldCom were cognizant of the New York Commission's impending action, as they argued that a significant reduction in New York switching rates was imminent and should be used in a benchmark comparison in this proceeding.[132] Finally, AT&T, WorldCom, and Verizon notified us of the New York Commission's new rate determinations shortly after release of the New York Commission's order.[133] In fact, AT&T now contends that the new New York rates are the only evidence Verizon can rely on to demonstrate that its Rhode Island rates satisfy checklist item two.[134] Therefore, we, along with parties to this proceeding, have been well aware of the outcome and impact of the New York rate proceeding since late January 2002, and have had an opportunity to review the new rates.

50. We commend the New York Commission's efforts in conducting a detailed and lengthy rate review in which many of the issues debated by the parties here were thoroughly evaluated.[135] The rate review began in February 2000, involved the filing of testimony, responsive testimony or rebuttal testimony by almost a dozen parties, including AT&T and WorldCom, seven days of hearings and several conferences, and hundreds of pages of briefs. This process resulted in a Recommended Decision by ALJ Linsider on May 16, 2001. Thereafter, for eight months, the New York Commission considered the Recommended Decision as well as exceptions filed by nearly a dozen parties, again including AT&T and WorldCom, with accompanying briefs and reply briefs. On January 28, 2002, in a detailed, 162-page order, the New York Commission reached a final determination regarding the numerous UNE rate issues it considered. In this order, the New York Commission made a reasonable, downward adjustment to switching rates in response to criticism of the superseded New York switching rates that were at issue in the New York Commission's original UNE rate proceeding, the Commission's New York section 271 proceeding, and the subsequent Massachusetts section 271 proceeding.[136] Specifically, the New York Commission reduced the switching rates after considering new evidence that Verizon continues to receive deep discounts on its new switches.[137] In adopting the lower rates, the New York Commission expressly provided for possible refunds to competing LECs who had paid the superseded (and discredited) interim

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131 *Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para. 247.

132 AT&T Comments at 15; WorldCom Comments at 10.

133 AT&T Feb. 1 *Ex Parte* Letter; WorldCom Jan. 31 *Ex Parte* Letter; Verizon Feb. 8 *Ex Parte* Letter.

134 AT&T Feb. 1 *Ex Parte* letter at 16.

135 *See New York UNE Rate Order* at 20-33.

136 *Bell Atlantic New York Order,* 15 FCC Rcd at 4085-86, para. 247; *Verizon Massachusetts Order*, 16 FCC Rcd at 9004, para. 33.

137 *New York UNE Rate Order* at 21.

rates.[138] Indeed, Verizon and other parties to the New York rate proceedings recently filed a settlement agreement providing for such refunds.[139]

51. In considering whether the new New York rates are an appropriate benchmark to demonstrate TELRIC compliance, we place significant weight on the input of commenters on this issue. In particular, as noted above, even before the New York Commission adopted the new rates, AT&T and WorldCom advocated both to the Rhode Island Commission and in this proceeding that the rates proposed by the New York ALJ more than nine months ago were the appropriate benchmark rates.[140] In fact, WorldCom asserted in this proceeding that "Verizon should adopt in Rhode Island the revised UNE rates of the New York ALJ . . . as a suitable proxy for TELRIC rates."[141] Immediately upon the New York Commission's adoption of the ALJ's recommendation, moreover, AT&T reiterated to this Commission that only by lowering the Rhode Island rates to meet a benchmark comparison to the new New York rates could Verizon satisfy checklist item two.[142] Further, when we sought comment on the question of using new New York rates as a benchmark,[143] no party suggested that the new New York rates are not TELRIC-compliant or are an inappropriate benchmark.

52. The New York Commission has demonstrated an admirable commitment to accurate, cost-based rate making both in the recent rate case and in the proceedings that the Commission and the United States Court of Appeals for the D.C. Circuit evaluated in granting and reviewing the decision to grant section 271 approval in New York. This conclusion is buttressed by the fact that Verizon's new New York switching rates are approximately half of the superseded rates and much closer to switching rates in states where section 271 approval has been granted more recently than in New York. Verizon's new New York non-loop rates more closely compare to non-loop rate levels in Texas, Oklahoma, Pennsylvania, and Missouri.

53. In sum, we base our conclusion to use the new New York rates as a benchmark in this proceeding on four factors. First, we rely on our previous conclusion that the New York Commission had conducted a TELRIC compliant proceeding when it set Bell Atlantic's original UNE rates and our affirmative finding that the resulting rates fell within a reasonable TELRIC range – a finding affirmed by the D.C. Circuit.[144] Second, we rely on the fact that, in a

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138 *Id*. at 22; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4085-86, para. 247.

139 AT&T Feb. 12 *Ex Parte* Letter at 3.

140 AT&T Comments at 15; WorldCom Comments at 10.

141 WorldCom Comments at iii. AT&T also stated: "To the extent that a benchmark analysis is used in this case, [the New York ALJ recommended rates] are the appropriate benchmark comparisons for Rhode Island at the present time." AT&T Comments at 15.

142 AT&T Feb. 1 *Ex Parte* Letter at 16.

143 *See* Feb. 14 Public Notice.

144 *AT&T Corp. v. FCC*, 220 F.3d 607 (D.C. Cir. 2000)

proceeding that spanned two years, included nearly a dozen parties, and generated almost 5000 pages of transcript, the New York Commission specifically addressed, among numerous TELRIC questions, the precise issue that was heavily debated in our initial consideration of Verizon's superseded New York rates. Third, we rely on the fact that no commenter has asserted, or submitted any evidence to indicate, that when the New York Commission adopted the new New York rates, it violated "basic TELRIC principles [or made] clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[145] In fact, to the contrary, commenters asserted that the new New York rates should serve as a benchmark in this proceeding.[146] Finally, we rely on the fact that the new New York rates are both lower and more in line with the rates we have approved in considering other section 271 applications. Under these circumstances, we find that, on the record before us, Verizon's new New York rates fall within a reasonable TELRIC range and are, therefore, an appropriate benchmark for Rhode Island.

54. We also note that Verizon's February 21 Rhode Island switching rates, which are much closer to its new New York switching rates, will soon be subjected to the additional scrutiny of the Rhode Island Commission. Although this additional scrutiny is not a basis for our decision, it demonstrates that commission's significant commitment to TELRIC principles. The Rhode Island Commission also has indicated a commitment to complete its new rate case expeditiously, with an expectation of adopting permanent rates by the end of 2002.[147]

55. As discussed at part II, above, we waive our "complete when filed" rule in the unique circumstances presented by this application to consider Verizon's February 21 Rhode Island switching rates as evidence of compliance with checklist item two.[148] Having determined that the new New York rates are appropriate rates for our benchmark comparison, we now compare Verizon's Rhode Island non-loop rates to new New York non-loop rates using our benchmark analysis. In taking a weighted average of non-loop rates in Rhode Island and New York, we find that Rhode Island's non-loop rates are roughly three percent lower than New York non-loop rates.[149] Taking a weighted average of Rhode Island and New York costs, we also find

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[145] *See, e.g.*, *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6266, para. 59.

[146] See AT&T Feb. 1 *Ex Parte* Letter at 16; AT&T Comments at 15; WorldCom Comments at iii.

[147] Rhode Island Commission Reply at 3.

[148] *See* the discussion of our waiver of our "complete when filed" rule *supra* part II.

[149] In reaching this conclusion, we used state-specific Dial Equipment Minutes (DEM) rather than nationwide data to compute minutes of use for the benchmark analysis. We also used data submitted by Verizon regarding interswitch versus intraswitch and originating versus terminating minutes of use. *See* Letters from Clint E. Odom, Director - Federal Regulatory, Verizon to William F. Caton, Acting Secretary, Federal Communications Commission, Feb. 19, 2002, Jan. 18, 2002, and Jan. 16, 2002. We used these data because, where available, verifiable, state-specific data provide a more valid comparison. We note that our use of this data has a very small effect on the outcome of the benchmark comparison. We also note that Verizon's new New York non-loop rates contain both a digital and an analog port rate. The New York rate structure uses the digital port rate of $2.57 as the rate charged for ports that are purchased as part of the UNE-Platform. Therefore, for purposes of our benchmark (continued….)

that Rhode Island non-loop costs are roughly three percent lower than New York non-loop costs. We conclude, therefore, that Verizon's Rhode Island non-loop rates compare favorably to its New York non-loop rates, and, therefore, satisfy our benchmark analysis and the requirements of checklist item two.

(iii) Loop Rates

56. We now evaluate the TELRIC compliance of Verizon's Rhode Island loop rates. Only WorldCom criticizes Verizon's loop rates, claiming that they are not TELRIC-compliant because they are based on cost studies with flawed assumptions.[150] We reject several of WorldCom's claims. Specifically, WorldCom objects to Verizon's assumptions regarding fill factors, fiber feed, structure-sharing, and use of more efficient integrated digital loop carrier. The Rhode Island Commission considered all of WorldCom's claims in its lengthy UNE rate proceeding. First, Verizon's loop rates incorporate fill factors – 75 percent for feeder, 50 percent for distribution, and 60 percent for interoffice transport – recommended by the Rhode Island Division[151] and which the Commission has found to be TELRIC-compliant in approving 271 applications in other states.[152] Second, based on the Rhode Island Division's recommendation, the Rhode Island Commission accepted an assumption that Verizon would use 100 percent fiber feeder, finding that "on a forward-looking basis, the industry is moving toward increased and exclusive use of fiber-optic feeder cables. . . ."[153] This assumption is consistent with Commission findings in approving section 271 applications in other states, which have been upheld in federal court.[154] We find that WorldCom presents no new arguments or facts in this proceeding which would cause us to find that these assumptions are inconsistent with TELRIC principles as applied to Verizon in Rhode Island.

57. We note that WorldCom alleges additional specific TELRIC violations not addressed above.[155] Assuming *arguendo* that WorldCom's other claims regarding flawed assumptions are valid, we conclude that the alleged errors do not result in rates outside the

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analysis, we have compared Verizon's New York digital port rate of $2.57, rather than the analog port rate of $4.22, or any blend of the two rates, to Verizon's February 21 single Rhode Island port rate of $1.86.

150 WorldCom Comments at 10.

151 *Rhode Island TELRIC Order* at 51-52; Rhode Island Commission Comments at 43, n.139; Verizon Cupelo/Garzillo/Anglin Decl. at 13-14, para. 44.

152 *See, e.g.*, *Verizon Massachusetts Order,* 16 FCC Rcd at 9007, para. 39; *SWBT Kansas/Oklahoma Order,* 16 FCC Rcd at 6275, paras. 79, 80.

153 *Rhode Island TELRIC Order* at 40.

154 *Bell Atlantic New York Order,* 15 FCC Rcd at 4087-88, paras. 248-249; *AT&T Corp. v. FCC*, 220 F.3d at 618-619 (upholding the Commission's finding that rates based on an assumption of 100 percent fiber feeder were consistent with TELRIC principles); *see also Verizon Pennsylvania Order,* 16 FCC Rcd at 17455, para. 59.

155 Specifically, WorldCom claims that loop rates do not incorporate TELRIC-compliant assumptions for structure sharing and use of integrated digital loop carrier. WorldCom Comments at 11-12.

reasonable range that a correct application of TELRIC principles would produce. Applying our benchmark analysis to New York and Rhode Island loop rates, we conclude that Rhode Island loop rates fall within the range that a TELRIC-based rate proceeding would produce. This result occurs whether we use Verizon's superseded New York loop rates or its new New York loop rates in our benchmark comparison.[156] Specifically, in taking a weighted average in New York and Rhode Island, we find that Verizon's Rhode Island loop rates are roughly the same as its superseded New York loop rates, even though the USF cost model suggests that loop costs in Rhode Island are 28.42 percent higher than New York.[157] We also find that Verizon's Rhode Island weighted average loop rates are roughly 22 percent higher than the new New York weighted average loop rates, even though Rhode Island weighted average loop costs are roughly 28.45 percent higher than New York weighted average loop costs. We conclude that Verizon's Rhode Island loop rates pass our benchmark comparison to both superseded and new New York loop rates, and satisfy checklist item two.

2. Operations Support Systems

58. We find, as did the Rhode Island Commission, that Verizon provides nondiscriminatory access to its Operations Support Systems (OSS) in Rhode Island.[158] Consistent with more recent Commission orders, we do not address each OSS element in detail where our review of the record satisfies us that there is little or no dispute that Verizon meets the nondiscrimination requirements.[159] In this case, commenters have raised no concerns with any aspect of Verizon Rhode Island's OSS. Nonetheless, because Verizon argues that it employs the same OSS in Rhode Island that the Commission reviewed in the *Verizon Massachusetts Order*, we address those aspects of its OSS that have changed since the time of that order – primarily Verizon's loop qualification functions. We also address those aspects of Verizon's Rhode Island OSS involving minor performance discrepancies or otherwise requiring explanation: order rejection notices, electronic jeopardies, UNE-Platform provisioning, and billing.

a. OSS Testing and Relevance of Massachusetts Performance

59. Consistent with our precedent, Verizon relies in this application on evidence that its Rhode Island and Massachusetts OSS are the same.[160] Specifically, Verizon asserts that it

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[156] We note that Verizon's new New York loop rates resulted from the same comprehensive UNE rate proceeding described in detail at paras. 50-53, *supra*.

[157] *See Verizon Pennsylvania Order,* 16 FCC Rcd at 17458, n.249; *Verizon Massachusetts Order,* 16 FCC Rcd at 9001, n.65, for a discussion of what assumptions are made and how costs are compared using the USF cost model.

[158] Rhode Island Commission Comments at 92.

[159] *See Verizon Connecticut Order*, 16 FCC Rcd at 14151, para. 8; *see also Verizon Pennsylvania Order*, 16 FCC Rcd at 17425, para. 12.

[160] *See* Appendix D at para. 32.

provides the same OSS to competing carriers in Massachusetts and Rhode Island.[161] To support its claim, Verizon submits reports from two third-party consultants.[162] In the first instance, Pricewaterhouse Coopers (PwC) evaluated the five OSS functions that provide competing LECs access to Verizon's systems and found them to be "identical" in Rhode Island and Massachusetts.[163] In the second instance, KPMG concluded that the systems or interfaces, processes, personnel, facilities, management structures, and performance measures were the same for both Rhode Island and Massachusetts.[164] The Rhode Island Commission also engaged KPMG to conduct three stand-alone tests in connection with Verizon's OSS, reviewing electronic jeopardies, line loss reports, and line sharing.[165] The Rhode Island Commission also concluded that Verizon uses a common OSS in both states.[166]

60. We conclude that Verizon, through the PwC report, its declaratory evidence, and the KPMG report, demonstrates that the OSS in Massachusetts are the same as the OSS in Rhode Island and, therefore, evidence concerning its OSS in Massachusetts is relevant and should be considered in our evaluation of Verizon's OSS in Rhode Island. Verizon's showing enables us to rely, for instance, on findings relating to Verizon's OSS from the *Verizon Massachusetts Order* in our analysis of Verizon's OSS in Rhode Island. In addition, because the OSS are the same in both states, where low volumes in Verizon's performance data in Rhode Island yield only inconclusive and inconsistent statistical findings concerning Verizon's compliance with the competitive checklist, we will examine data reflecting Verizon's performance in Massachusetts.

b. Verizon's Loop Qualification Process

61. Based on the evidence in the record, we find, as the Rhode Island Commission did, that Verizon provides access to loop qualification information in a manner consistent with the requirements of the *UNE Remand Order*.[167] Specifically, we find that Verizon provides

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[161] Verizon Application at 58; Verizon McLean/Wierzbicki Decl. at paras. 23, 50, 86, 90, 102, 115, 134, and Tab 2 at 1, 9, 11.

[162] The PwC report explains the similarities among the OSS in the Verizon New England states (Massachusetts and Rhode Island, as well as Maine, New Hampshire and Vermont). Verizon Application App. B, Tab 3, PricewaterhouseCoopers LLP report offered as Verizon's response to WorldCom data request 1-5 (PwC Report). The KPMG report explains only the similarities of Massachusetts and Rhode Island systems and describes three stand-alone tests of Rhode Island OSS elements that were not previously evaluated in Massachusetts. Verizon Application App. E, Tab 11, KPMG Report (KPMG Report).

[163] *See* PwC Report at 9.

[164] *See* KPMG Report at 13. Only in a single area, Metrics Change Management, did KPMG conclude that there were existing material differences. KPMG found that these differences reflected enhancements to Verizon's OSS since the time of the Massachusetts test. KPMG Report at 13.

[165] *Id.* at 5.

[166] Rhode Island Commission Comments at 92.

[167] *UNE Remand Order*, 15 FCC Rcd at 3885-87, paras. 427-31 (1999); Rhode Island Commission Comments at 92.

competitors with access to all of the same detailed information about the loop that is available to itself, and in the same time frame as any of its personnel could obtain it.[168] Verizon provides four ways for competing carriers to obtain loop make-up information: (1) access to loop make-up information in its Loop Facility Assignment and Control System (LFACS) database; (2) manual loop qualification; (3) mechanized loop qualification based on information in its LiveWire database; and (4) engineering record requests. We evaluate all four of these methods below, and we pay particular attention to the permanent OSS Verizon has implemented since the time of the *Verizon Massachusetts Order* to enhance the first two aspects of the OSS described above: access to loop make-up information in LFACS and manual loop qualification.[169] No commenter has raised concerns with regard to any aspect of Verizon's loop qualification OSS.

62. *Access to LFACS.* Since the adoption of the *Verizon Massachusetts Order*, Verizon has implemented a transaction by which competing LECs can obtain access to the loop make-up information contained in Verizon's LFACS database.[170] Verizon now returns loop make-up information in LFACS to requestors in a parsed format, which permits competing LECs to integrate the information between the pre-ordering and ordering systems. Verizon also now responds to requests for information from LFACS in real time.[171] We commend Verizon for making these improvements to its loop qualification OSS, and we find that Verizon satisfies this element of checklist item two.

63. *Manual Loop Qualification.* Since the time of the *Verizon Massachusetts Order*, Verizon has implemented a pre-order transaction by which competing LECs can request that Verizon perform a manual loop qualification.[172] Using this transaction, competing LECs can request manual loop qualification prior to actually placing their orders for the loops.[173] Verizon

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[168] *See Verizon Massachusetts Order*, 15 FCC Rcd at 9016-17, para. 54. Additional support can be found in the PwC and KPMG reports. *See* PwC Report at 17-18; KPMG Report at 20.

[169] The Commission stated in the *Verizon Pennsylvania Order* that it intended to evaluate Verizon's permanent loop qualification OSS in section 271 applications Verizon filed after October 2001. *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17447-48, para. 45. This is the first such application.

[170] *See* Verizon McLean/Wierzbicki Decl. at para. 46.

[171] *See* Verizon McLean/Wierzbicki Decl. Tab 2, at 5; Letter from Clint Odom, Director, Federal Regulatory, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Jan. 11, 2002) (Verizon Jan. 11 *Ex Parte* Letter). There are no performance measures to illustrate the timeliness of competitive LEC access to the LFACS information. To demonstrate timeliness, Verizon conducted a special study of Loop Make-Up transaction performance for the months of November and December 2001. During this time there were no competitive LEC transactions regarding loop make-up in Rhode Island. Additionally, there were no competitive LEC requests using the CORBA interface for loop make-up information in any area within the former Bell Atlantic footprint. There were 12 requests using EDI and the average response time was 13.16 seconds. There were 544 requests using the Web GUI interface and the average response time for these was 15.06 seconds. *See* Verizon Jan. 11 *Ex Parte* Letter.

[172] *See* Verizon McLean/Wierzbicki Decl. at para. 45. *Cf. Verizon Massachusetts Order*, 15 FCC Rcd at 9023-24, para. 65.

[173] *Cf. Verizon Massachusetts Order*, 15 FCC Rcd at 9023-24, para. 65.

consistently responds to manual loop qualification requests within the 48-hour benchmark in Rhode Island.[174] We commend Verizon for implementing these enhancements, and we find that Verizon's manual loop qualification process complies with the requirements of this checklist item.

64. *Mechanized Loop Qualification.* We find that Verizon continues to provide competing LECs with timely and nondiscriminatory access to the mechanized loop qualification information contained in its LiveWire database.[175] Verizon also continues to provide competing LECs with the ability to obtain loop pre-qualification information "in bulk," by downloading files from Verizon's server that contain information on all pre-qualified loops served by a single central office.[176] Thus, we find that this process complies with the requirements of the *UNE Remand Order* and section 271.

65. *Engineering Record Requests.* We find that Verizon continues to offer competing LECs nondiscriminatory access to engineering record requests, as it did at the time of the *Verizon Massachusetts Order*.[177] Accordingly, we find Verizon complies with section 271 in regards to access to engineering records.

c. Ordering Issues

(i) Order Rejection Notices and Order Rejections

66. We find, as the Rhode Island Commission did,[178] that Verizon provides competing carriers with order rejection notices in a manner that allows them a meaningful opportunity to compete. We recognize that, at first glance, Verizon's performance data do not demonstrate that it notifies competing LECs promptly on rejecting their orders.[179] Verizon explains that, in fact, it

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[174] *See* Verizon Guerard/Canny/Abesamis Decl. Tab 4.

[175] *See* Verizon McLean/Wierzbicki Decl. Tab 2, at 1-3. Verizon's Rhode Island performance data demonstrate, in each month for which data exist, that it provides access to LiveWire within the timeframe adopted by the Rhode Island Commission. *See* PO 1-6-6020 (Facility Availability (Loop Qualification) – EDI), PO 1-6-6030 (Facility Availability (Loop Qualification) – CORBA) (no activity); PO 1-6-6050 (Facility Availability (Loop Qualification) - Web GUI). Because Verizon only began reporting on its EDI interface in Rhode Island in October, we look to the Massachusetts data to support our finding. In Massachusetts, Verizon met the same standard of timely access in all months (July to October). PO-1-6-6020 (Facility Availability (Loop Qualification) – EDI); PO 1-6-6050 (Facility Availability (Loop Qualification) - Web GUI); *see also* KPMG Report at 25 (POP 1-4-1 Pre-Order Response Timeliness).

[176] *See* Verizon McLean/Wierzbicki Decl. Tab 2, at 3.

[177] *See Verizon Massachusetts Order*, 15 FCC Rcd at 9020, para. 59; *see also* Verizon McLean/Wierzbicki Decl. Tab 2, at 6-7. Verizon states that it received no requests for engineering records in July, August, or September in either Rhode Island or Massachusetts. *See* Verizon McLean/Wierzbicki Decl. at para. 49.

[178] *See* Rhode Island Commission Comments at 92-95.

[179] Specifically, Verizon has not consistently provided 95% of reject notices within established timeframes, as required by the Rhode Island Commission. *See* OR-2-04-2320 (resale POTS reject timeliness – 1-5 lines) (showing (continued….)

has consistently sent rejection notices in a timely fashion, but its data do not reflect this performance because of a software problem that affected how Verizon's OSS captured its performance data under this metric. Specifically, Verizon incorrectly included some orders for six or more lines (which have a 72-hour benchmark) in the metric for orders of one to five lines (which have a 24-hour benchmark).[180] Verizon states that it corrected this data capture problem in October; the correction is borne out by the fact that Verizon's November performance consistently satisfies the relevant benchmarks.[181] No commenter has raised any concern regarding Verizon's rejection notices.

(ii) Jeopardy Information

67. We find that Verizon provides "jeopardy" information to competing LECs – that is, notification that an order may not be provisioned on the designated due date – in substantially the same time and manner as it makes this information available to its retail operations. Verizon provided competing LECs with manual access to jeopardy notices at the time of the Massachusetts filing, but has recently begun also providing active jeopardy notices to competing LECs.[182] Notwithstanding the availability of this new process, Verizon still provides competing LECs with manual access to jeopardy information in Rhode Island. We base our finding of checklist compliance in this instance, as did the Rhode Island Commission, on Verizon's manual jeopardy process.[183] We do not rely on Verizon's electronic process in reaching this conclusion,

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timeliness rates of 92%, 92%, 93%, and 92%); OR-2-04-2200 (resale specials reject timeliness) (showing timeliness rates of 81%, 100%, 90%, and 90%); OR-2-04-3331 (UNE loop/pre-qualified complex/LNP reject timeliness – 1-5 lines) (showing timeliness rates of 89%, 96%, 82%, and 94%).

[180] *See* Verizon McLean/Wierzbicki Decl. at para. 72; Verizon Guerard/Canny/Abesamis Decl. at para. 37.

[181] In November, Verizon satisfied the relevant benchmarks for all metrics mentioned *supra* n.179. Verizon's performance has been inconsistent under two other metrics that are not affected by the "data capture" problem identified by Verizon. *See* OR-2-06-3331 (UNE loop/pre-qualified complex/LNP reject timeliness – 6 or more lines) (showing timeliness rates of 94%, 92%, 100%, and 91%); *see also* OR-2-04-2200 (resale specials reject timeliness) (showing timeliness rates of 81%, 100%, 90%, and 90%). We find that these performance disparities are slight, and note that Verizon's average timeliness rate for the past five months has been 95% and 94% respectively for these two measurements. Because this average performance meets, or is so close to, the 95% benchmark, we do not find Verizon's occasionally late performance in sending out rejection notices as reflected in these metrics to be competitively significant.

[182] *See* Verizon McLean/Wierzbicki Decl. at paras. 76-83. In the New York and Massachusetts proceedings, Verizon provided evidence that it provided competitive LECs with Open Query System (OQS) reports, which notify competitive LECs that a provisioning order or maintenance appointment may be in jeopardy, and that this system was as good as the system used by Bell Atlantic for its own provisioning and maintenance. The Rhode Island Commission found that Verizon still has this system in place and therefore passes this checklist item. Rhode Island Commission Comments at 68. Electronic jeopardies have not been found by the Commission to be necessary for checklist compliance. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4051, para. 184; *see also Verizon Massachusetts Order*, 16 FCC Rcd at 9034, para. 85.

[183] As we stated in the *Verizon Massachusetts Order*, although Verizon's implementation of a system of active jeopardy notices likely will provide additional benefit to carriers, it is not relevant to our determination here that its current system is nondiscriminatory. *See Verizon Massachusetts Order*, 16 FCC Rcd at 9034 n.264.

as the evidence provided by Verizon does not allow us to determine that its electronic process provides competing LECs with sufficient and reliable jeopardy notices. We note that KPMG tested Verizon's new electronic jeopardy process, but found that the results were inconclusive.[184] Verizon does not provide performance data or other evidence to support its claims regarding its electronic jeopardy process.

68. At this time, we conclude that Verizon complies with this checklist item with regard to electronic jeopardies because of Verizon's past compliance in this area and the absence of any record evidence to the contrary. We certainly encourage BOC innovation in bringing new OSS features to competitive LECs. We also expect, however, that any such changes will operate in a manner that enhances, rather than impairs, competitive LECs' ability to compete. We will continue to monitor this issue and its effect on competitive LECs.

d. Provisioning Issues

69. *Average Interval Completed Metrics*. Based on the evidence in the record, we find that Verizon provisions competitive LEC orders for UNE-Platform and resale services in a nondiscriminatory manner. We note that Verizon has demonstrated that the provisioning systems and processes used in Rhode Island for UNE and resale service orders are the same as those the Commission reviewed in the Massachusetts section 271 proceeding. In order to make our determination that Verizon's performance reflects parity, we review performance measures comparable to those we have relied upon in prior section 271 orders.[185]

70. We recognize that Verizon's performance with respect to one specific performance metric, which measures the time it takes Verizon to complete competing LEC orders for UNE-Platform service,[186] appears to be out of parity in Rhode Island for several recent months. We find, however, that Verizon's performance with regard to this metric does not warrant a finding of checklist non-compliance. First, we note that Verizon's performance reflected by another metric measuring provisioning – the "missed appointments" metric – reflects parity performance with respect to UNE-Platform orders for the relevant months.[187] The Commission has given substantial weight to this metric in previous section 271 applications. Second, we note that the "average completed interval" metric, because of the way it is designed, may not be an accurate indicator of Verizon's provisioning performance. Verizon has explained that, while retail and wholesale orders are provisioned according to the same list of "standard

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[184] The KPMG test analyzed over 400 orders. Only 10 orders required jeopardy notices. A jeopardy notice was provided in 6 of those instances. Of the four for which a jeopardy notice was not issued, Verizon sent a query notice instead of a jeopardy notice three times. *See* KPMG Report at 29, POP-1-17-1.

[185] *See* Appendix D at para. 37; *see also Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

[186] OR 2-1-3140 (Average Completed Interval - Av. Completed Interval - Total No Dispatch).

[187] PR 4-4-3140 (Provisioning - Missed Appointments - % Missed Appt. – Verizon – Dispatch).

intervals," these intervals vary from product to product.[188] Accordingly, this metric could suggest unequal treatment simply because a competing LEC orders a disproportionate share of products with a longer-than-average standard provisioning interval.[189] Significantly, the Commission has discounted the relevance of this metric in prior section 271 orders where there is evidence of this "order mix" concern.[190] We also take note of the fact that the Carrier Working Group in New York has decided to eliminate the "average interval completed" series of metrics.[191] Finally, even setting aside the questions about the accuracy of this metric, we find that the performance differences reported under this metric are relatively slight and do not appear to be competitively significant to competing LECs.[192] Indeed, no commenter has indicated that UNE-Platform provisioning is a problem in Rhode Island. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[193]

e. Billing

71. We find, as did the Rhode Island Commission, that Verizon provides nondiscriminatory access to the functionality of its billing systems in Rhode Island.[194] Verizon provides competing LECs with usage information necessary to bill their end users, and it provides competing carriers with wholesale bills.[195] Verizon also demonstrates, through the PwC report, the KPMG report, and its declarations, that its billing systems in Rhode Island are the same as its Massachusetts systems, which the Commission found to comply with the requirements of this checklist item.[196] Verizon explains in this proceeding that its billing system in Rhode Island is different from the billing system in Pennsylvania because the relevant aspects

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188 *See* Letter from Clint Odom, Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 at 2 (filed Jan. 8, 2002) (Verizon Jan. 8 *Ex Parte* Letter).

189 *See* Verizon Jan. 8 *Ex Parte* Letter at 2.

190 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9038-39, para. 92; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4061-62, paras. 203-05.

191 *See infra* para. 86.

192 PR 2-01-3140 differences of .51 to 1.37 days are reported for the last four months of data.

193 *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

194 Rhode Island Commission Comments at 95.

195 Verizon McLean/Wierzbicki Decl. at paras. 103-05.

196 PwC Report at 33-41; KPMG Report at 145-89; Verizon McLean/Wierzbicki Decl. at paras. 102-11; Verizon Guerard/Canny/Abesamis Decl. at paras. 68-73.

of its Rhode Island and Pennsylvania billing systems evolved separately after divestiture in 1984.[197] No commenter has raised concerns with Verizon's billing OSS in this proceeding.[198]

3. UNE Combinations

72. In order to comply with checklist item two, a BOC also must demonstrate that it provides nondiscriminatory access to network elements in a manner that allows requesting carriers to combine such elements and that the BOC does not separate already-combined elements, except at the specific request of the competitive carrier.[199] Based upon the evidence in the record, we conclude, as did the Rhode Island Commission, that Verizon demonstrates that it provides nondiscriminatory access to network element combinations as required by the Act and our rules.[200] Additionally, no commenter raised any concerns with Verizon providing nondiscriminatory access to UNE combinations.

B. Other Items

1. Checklist Item 1 – Interconnection

73. Section 271(c)(2)(B)(i) requires the BOC to provide equal-in-quality interconnection on terms and conditions that are just, reasonable and nondiscriminatory in accordance with the requirements of sections 251 and 252.[201] Based on our review of the record, we conclude, as did the Rhode Island Commission,[202] that Verizon complies with the requirements of this checklist item. In reaching this conclusion, we have examined Verizon's performance with respect to collocation and interconnection trunks, as we have done in prior section 271 proceedings.[203] We find that Verizon's performance generally satisfies the applicable benchmark or retail comparison standards.[204] As described below, we also examine

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197 *See* Letter from Clint Odom, Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 at 1-3 (filed Jan. 7, 2002) (Verizon Jan. 7 *Ex Parte* Letter).

198 We note that although Z-Tel raised the billing concerns with regard to Verizon's Pennsylvania section 271 application, the Verizon Massachusetts billing systems was applauded. *See* Z-Tel Comments on the *Application by Verizon Pennsylvania Inc., Verizon Long Distance, Verizon Enterprise Solutions, Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region, InterLATA Services in Pennsylvania*, CC Docket No. 01-138, at 6 (filed Aug. 6, 2001).

199 47 U.S.C. § 271(c)(2)(B)(ii); 47 C.F.R. § 51.313(b).

200 Rhode Island Commission Comments at 43.

201 *See* Appendix D at para. 17.

202 Rhode Island Commission Comments at 33.

203 *See, e.g.*, *Verizon Massachusetts Order*, 16 FCC Rcd at 9092-95, 9098, paras. 183-87, 195.

204 *See* Appendix B.

Verizon's compliance with the Commission's more recent *Collocation Remand Order*.[205] Finally, we note that no commenter raises issues concerning Verizon's interconnection offering.

74. On August 8, 2001, the Commission released its *Collocation Remand Order*, which changed the collocation obligations of incumbent LECs in response to the D.C. Circuit's remand of certain aspects of the Commission's earlier collocation order.[206] In particular, the Commission established the criteria for equipment that is "necessary for interconnection or access" under section 251(c)(6); required incumbents to provide cross-connects between collocated carriers; and established principles for physical collocation space and configuration.[207] Verizon states that it has modified its Rhode Island collocation offering to comply with the order, and has filed amendments to both its federal and state collocation tariffs to reflect the new order – both of which have gone into effect.[208] Based on the record in this proceeding, we find that Verizon's collocation offerings in Rhode Island satisfy the new requirements set forth in the *Collocation Remand Order*.

75. Verizon also states that its collocation offering meets the requirements of its September 14, 2001 consent decree with the Commission to assure that Verizon complies with the information posting requirements of the Commission's collocation rules.[209] We note that the Bell Atlantic-GTE auditing process will assure that Verizon does, and will continue to, fulfill the consent decree and meet the requirements of checklist item one.[210]

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[205] *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, CC Docket No. 98-147, 16 FCC Rcd 15435 (rel. Aug. 8, 2001) (*Collocation Remand Order*) (on remand from *GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000)); *petition for recon. pending*, *Petition for Partial Clarification or Reconsideration of the Association for Local Telecommunications Services, et al.*, CC Docket No. 98-147 (filed Sept. 19, 2001); *petitions for review pending sub nom. Verizon California Inc., et al. v. FCC*, D.C. Circuit Nos. 01-1371 *et al.* (filed Aug. 23, 2001). We address Verizon's compliance with this order for the first time here, as this is the first section 271 application Verizon has filed since that order took effect.

[206] *See Collocation Remand Order*, 16 FCC Rcd at 15435; *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket No. 98-147, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4773-74, paras. 23-24 (1999), *aff'd in part, vacated and remanded in part sub nom. GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), *on recon*., *Collocation Reconsideration Order*, 15 FCC Rcd at 17806-39, paras. 1-69;

[207] *Collocation Remand Order*, 16 FCC Rcd at 15436, para. 2.

[208] *See* Verizon Application at 23; Lacouture/Ruesterholz Decl. at para. 54 and Attach. 7 at 1, 3, 4, 11 (Rhode Island wholesale tariff); Tariff F.C.C. No. 11, Part 27.

[209] *See* Verizon Application at 23; Verizon Lacouture/Ruesterholz Decl. at para. 49; *Verizon Communications Inc.*, Order and Consent Decree, File No. EB-01-IH-0236, 16 FCC Rcd 16270 (EB 2001).

[210] *See Application of GTE Corp., Transferor, and Bell Atlantic Corp., Transferee, for Consent To Transfer Control of Domestic and International Sections 214 and 310 Authorizations and Application To Transfer Control of a Submarine Cable Landing License*, Order, 15 FCC Rcd 14032, 14327-28, App. D, para. 56 (2000).

2. Checklist Item 4 – Unbundled Local Loops

76. Section 271(c)(2)(B)(iv) of the Act requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[211] Based on the evidence in the record, we conclude, as did the Rhode Island Commission, that Verizon provides unbundled local loops in accordance with the requirements of section 271 and our rules.[212] Our conclusion is based on our review of Verizon's performance for all loop types, which include, as in past section 271 orders, voice grade loops (including hot cut provisioning), xDSL-capable loops, digital loops, and high capacity loops, and our review of Verizon's processes for line sharing and line splitting. As of September 2001, competitors have acquired and placed into use over 28,000 stand-alone loops (including DSL loops) from Verizon in Rhode Island.[213] Finally, we note that commenters have not raised any issues with respect to any aspect of Verizon's loop performance.

77. Consistent with prior section 271 orders, we do not address every aspect of Verizon's loop performance where our review of the record satisfies us that Verizon's performance is in compliance with the parity and benchmark measures established in Rhode Island.[214] Instead, we focus our discussion on those areas where the record indicates minor discrepancies in performance between Verizon and its competitors. As in past section 271 proceedings, in the course of our review, we look for patterns of systemic performance disparities that have resulted in competitive harm or that have otherwise denied new entrants a meaningful opportunity to compete.[215] Isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[216] We note that, when reviewing Verizon's performance with respect to a certain category of loop in a given month, the volume of orders may be too low to provide a meaningful result. Because we find that Verizon uses the same provisioning and maintenance

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[211] 47 U.S.C. § 271(c)(2)(B)(iv); *see* Appendix D at paras. 48-52 (regarding requirements under checklist item four).

[212] *See* Rhode Island Commission Comments at 133-36. The Department of Justice concluded that "Verizon has generally succeeded in opening its local markets in Rhode Island to competition." Department of Justice Evaluation at 6. The Department cites Verizon's estimate that using all modes of entry, for business and residential customers combined, competitors serve approximately 119,000 lines in Rhode Island, around 16% of all lines in the state. *Id.* at 4.

[213] *See* Verizon Lacouture/Ruesterholz Decl. at para. 86. As of September, 2001, Verizon had provisioned approximately 28,000 stand-alone loops (including DSL loops), 300 high capacity DS1 loops, approximately 58 digital loops (from July-October) and 4 line sharing arrangements. *See* Verizon Lacouture/Ruesterholz Decl. at paras. 86, 118, and 175; *see also* PR 6-03-3341.

[214] *See, e.g.*, *Verizon Connecticut Order*, 16 FCC Rcd at 14151-52, para. 9.

[215] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

[216] *See id.*

and repair processes in Massachusetts and Rhode Island, we may look to Verizon's performance in Massachusetts to inform our analysis.[217]

78. *xDSL-Capable Loops*. Based on the evidence in the record, we find, as did the Rhode Island Commission, that Verizon demonstrates that it provides stand-alone xDSL-capable loops in accordance with the requirements of checklist item four.[218] Verizon makes available xDSL-capable loops in Rhode Island through interconnection agreements and pursuant to tariffs approved by the Rhode Island Commission.[219] In analyzing Verizon's showing, we review performance measures comparable to those the Commission has relied upon in prior section 271 orders: order processing timeliness, installation timeliness, missed installation appointments, installation quality, and the timeliness and quality of the maintenance and repair functions.[220] Based on our analysis of Verizon's performance under these measures, we conclude that Verizon's performance for competitive LECs has generally met the benchmark and parity standards established in Rhode Island.[221]

79. Upon initial review, the overall level of trouble reports for stand-alone xDSL-capable loops in Rhode Island appears to be out of parity.[222] The current version of the relevant performance metric used in Rhode Island compares competitive LEC troubles to those experienced by Verizon's advanced services affiliate. However, the New York Commission recently established retail POTS service as the applicable comparison group.[223] As described above, the New York Commission developed Verizon's performance measurements, business

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[217] KPMG Consulting found that the systems or interfaces, processes, personnel, facilities, management structures, and performance measures were the same for both Rhode Island and Massachusetts. *See* KPMG Report at 13.

[218] Rhode Island Commission Comments at 133-36.

[219] Verizon Lacouture/Ruesterholz Decl. at para. 131.

[220] *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17462-63, para. 79; *Verizon Connecticut Order*, 16 FCC Rcd at 15153-56, paras. 15-20; *Verizon Massachusetts Order*, 16 FCC Rcd at 9056, para. 123, and 9059, para. 130; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6326-27, paras. 181-82. We note that individual states and BOCs may define performance measures in different ways. We look to those measurements, however, that provide data most similar to data we have relied upon in past orders.

[221] *See supra* part III.A.2.c(i).

[222] *See* MR 2-02-3342 (Network Trouble Report Rate – Loop). Since July, Verizon has not achieved parity. *See also* MR 2-03-3342 (Network Trouble Report Rate – Central Office). Verizon missed parity in July and September. During the months of July through September, 0.56% of DSL loops in Rhode Island reported troubles found in either the outside plant (MR-2-02) or the central office (MR-2-03), compared to 0.09% for the current retail comparison group (VADI).

[223] For the MR-2 through MR-5 metrics, the New York Commission adjusted the retail analogue to compare Verizon's performance for competitors with Verizon's own retail POTS service rather than its DSL service because the Carrier Working Group reached consensus that retail POTS troubles are more similar (than VADI line sharing troubles) to 2-Wire digital and 2-Wire xDSL Loop troubles. *See* Verizon Application App. N, Tab 6, State of New York Public Service Commission Order Modifying Existing and Establishing Additional Inter-Carrier Service Quality Guidelines at Attach. 1, Section E, page 29 (Oct. 29, 2001) (New York Commission October Order).

rules and standards in a collaborative state proceeding with input from competing carriers, and the Rhode Island Commission has adopted these performance measures, business rules and standards.[224] Accordingly, we agree that retail POTS service appears to be a more probative comparison in this context.[225] Verizon has calculated its performance using the revised analogue, and it is in parity.[226]

80. *Digital Loops*. Based on the evidence in the record, we find, as did the Rhode Island Commission, that Verizon's performance with respect to digital loops complies with checklist item four.[227] For the relevant four month period, Verizon provisioned, on average, only 14.5 digital loops per month in Rhode Island.[228] Because these volumes are insufficient upon which to make a finding, we look at Massachusetts data, which show that Verizon's performance with respect to digital loops continues to meet the requirements of checklist item four.[229] We reach this conclusion despite the fact that the measures for Installation Trouble[230] and Repeat Trouble Reports[231] show Verizon's performance to be out of parity for almost every month reported.

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[224] *See supra* part II.

[225] In prior section 271 proceedings, the Commission has given deference to business rules developed in a collaborative state proceeding. *See Verizon Massachusetts Order*, 16 FCC Rcd at 9057, para. 126.

[226] During July, August and September, 2001, 1.11% of DSL loops in Rhode Island reported troubles found in either the outside plant or the central office, compared to 1.24% for the retail comparison group (retail POTS service). *See* Verizon Lacouture/Ruesterholz Decl. at para. 157, Attach. 38.

[227] *See* Rhode Island Commission Comments at 133-36.

[228] The number of digital loops provisioned on average for July-October was taken from the performance data provided for the PR 6-03-3341 (Percent Installation Troubles Reported Within 30 Days – FOK/TOK/CPE) measure.

[229] Verizon's performance for timeliness of order confirmation notices in Massachusetts generally meets or exceeds the benchmark from July through October. *See* OR 1-02-3331 (Percent On Time LSRC – Flow Through), OR 1-04-3331 (Percent On Time LSRC/ASRC – No Facility Check), and OR 1-06-3331 (Percent On Time LSRC/ASRC – Facility Check). Verizon is also provisioning digital loops in a timely manner in Massachusetts. For PR 4-04-3341 (Percent Missed Appointments – Dispatch) and PR 4-05-3341 (Percent Missed Appointments – No Dispatch), Verizon's performance is at parity for non-dispatch from July through October, and better than parity for dispatch for this same period of time. Also, Verizon's performance for most maintenance and repair functions for digital loops is comparable for Verizon retail customers and competitive LECs. For example, the Mean Time to Repair for digital loops exceeded parity from July through October. *See* MR 4-01-3341 (Mean Time to Repair – Total). However, between July and October, Network Trouble reports for competitive LECs found in either the outside plant or the central office were reported slightly more often than for Verizon's retail customers, but, on average, still less than 3% of the time (1.55% for MR-2-02 and 0.36% for MR-2-03). *See* MR 2-02-3341 (Network Trouble Report Rate – Loop) and MR 2-03-3341 (Network Trouble Report Rate – Central Office).

[230] *See* PR 6-01-3341 (Percent Installation Troubles Within 30 Days). The July-October average for this measure is 12.85% for competitive LECs and 1.28% for Verizon retail.

[231] *See* MR 5-01-3341 (Percent Repeat Reports Within 30 Days). The July-October average for this measure is 34.46% for competitive LECs and 19.69% for Verizon retail. However, as it did with xDSL-capable loops, the (continued….)

81. According to Verizon, however, the disparate performance results are not the result of discriminatory conduct, but rather the result of a flawed metric. Verizon argues that the Installation Trouble measure may not be an accurate indicator of Verizon's performance because the retail comparison group for this metric (Verizon retail) does not provide an "apples-to-apples" comparison.[232] For example, Verizon explains that most of the competitor LEC 2-wire digital loops are provisioned using fiber, while most of the orders in the retail comparison group are provisioned using copper.[233] Verizon also explains that competitive LEC loops are predominantly used for data transmission (IDSL), while the retail comparison group loops are predominantly used for voice transmission (either POTS or ISDN).[234] Accordingly, we agree with Verizon that this metric may appear to suggest unequal treatment simply because of the comparison group used. In addition, we find that Verizon's disparate performance under the Repeat Trouble Report metric apparently is the result of a flawed measurement. First, as explained above, for the MR-2 through MR-5 metrics, the New York Commission recently established retail POTS service as the applicable comparison group for 2-Wire digital and xDSL-capable loops.[235] Second, as explained in more detail below, the New York Commission has also further revised the MR-5 measure (the Repeat Trouble Report metric) for all loop types to exclude misdirected dispatches in order to more accurately capture performance for which Verizon is responsible.[236] We believe that these revisions reasonably demonstrate that the current version of the Repeat Trouble Report metric is flawed, which likely accounts for some of the performance disparities.

82. Moreover, given Verizon's generally acceptable performance for all other categories of loops, and recognizing that digital loops represent only a small percentage of overall loop orders in Rhode Island,[237] we do not believe that the uncertain performance for digital loops discussed above merits a finding of checklist noncompliance. Commenters in this proceeding do not criticize Verizon's performance with regard to digital loops.

83. *Hot Cut Activity*. Based on the evidence in the record, we find, as did the Rhode Island Commission, that Verizon is providing voice grade loops through hot-cuts in Rhode

(Continued from previous page)
New York Commission has adjusted the retail analogue for digital loops to compare Verizon's performance for competitors with Verizon's own retail POTS service. *See supra* n.223.

232 *See* Letter from Clint Odom, Director, Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 at 1 (filed Jan. 17, 2002) and Verizon Jan. 8 *Ex Parte* Letter at 6.

233 *Id.*

234 *Id.*

235 *See supra* para. 79 and n.223.

236 *See infra* para. 85 and n.247.

237 In July, Verizon provisioned approximately 28 digital loops for competitors; in August, it provisioned approximately 19 digital loops; in September, it provisioned approximately 5 digital loops; and in October, Verizon provisioned approximately 6 digital loops for competitors. *See* PR 6-03-3341.

Island in accordance with the requirements of checklist item four.[238] Verizon has satisfied its benchmark for on-time performance for hot-cuts for the relevant four month period,[239] and Verizon indicates that trouble reports received within seven days of installation have been fewer than one percent.[240] In addition, Verizon indicates that during July, August and September 2001, it completed hot-cuts in Rhode Island within, on average, 5.19 days, which is just slightly longer than the standard five day interval for orders of one to nine lines.[241] We note, however, that the performance metric that captures Verizon's performance includes orders for both one to nine lines (which have a five day standard provisioning interval) as well as orders for ten or greater lines (which have a negotiated provisioning interval).[242] Accordingly, we find that the difference between Verizon's overall hot-cut performance and the five day benchmark is not competitively significant in these circumstances. No commenter has raised concerns with Verizon's hot-cut provisioning.

84. *Voice Grade Loops*. Based on the evidence in the record, we find, as did the Rhode Island Commission, that Verizon provisions voice grade loops in a nondiscriminatory manner.[243] In order to determine that Verizon's performance reflects parity, we review performance measures comparable to those we have relied upon in prior section 271 orders.[244] We note that no commenter has raised an issue relating to provisioning of voice grade loops.

85. We recognize that Verizon's performance with respect to two specific performance metrics appears to be out of parity in Rhode Island for several recent months. We find, however, that this performance does not warrant a finding of checklist noncompliance. First, upon initial review, Verizon's performance with respect to a maintenance and repair measure – the repeat trouble report rate – appears to be out of parity in two of the last four months.[245] According to Verizon, however, when its performance under this metric is recalculated under the new guidelines adopted by the New York Commission, its performance

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238 *See* Rhode Island Commission Comments at 133-36.

239 *See* PR 9-01-3520 (Percent On Time Performance – Hot Cut).

240 *See* Verizon Lacouture/Ruesterholz Decl. at para. 115; *see also* PR 6-02-3520 (Percent Installation Troubles Reported Within 7 Days – Hot Cut Loop). Verizon's performance exceeds the benchmark for hot cuts in Rhode Island for July-October.

241 *See* Verizon Lacouture/Ruesterholz Decl. at para. 113. *See also* PR 2-01-3111 (Average Completed Interval-Total No Dispatch – Hot Cut Loop).

242 *See* PR 2-01-3111 (Average Completed Interval-Total No Dispatch – Hot Cut Loop).

243 *See* Rhode Island Commission Comments at 133-36.

244 *See* Appendix D at para. 37; *see also Verizon Massachusetts Order*, 16 FCC Rcd at 9078-79, para. 162.

245 For repeat trouble reports within 30 days, MR 5-01-3550, Verizon did not achieve parity in July and October.

under this measure is at parity.[246] Verizon explains that the New York Commission has recently revised the repeat trouble report rate to account for misdirected dispatches that skew performance results by overstating repeat troubles.[247] We agree that the revised metric will more accurately reflect Verizon's performance.[248]

86. Second, Verizon's performance with respect to a provisioning timeliness metric – the average completed interval metric – appears to be out of parity in Rhode Island for several recent months.[249] We note, however, that Verizon's performance reflected by another provisioning timeliness metric – the "missed appointment" metric – satisfies the benchmark for all relevant months.[250] Next, as explained in more detail above, this metric, because of the way it is designed, may not be an accurate indicator of Verizon's performance.[251] Furthermore, the Carrier Working Group in New York, working through the collaborative process, has agreed to the deletion of this provisioning timeliness metric.[252] Finally, even setting aside the questions

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[246] During July, August, and September 2001, Verizon's repeat trouble report rate in Rhode Island under the new business rules was 16.67% for competitive LECs and 16.63% for the retail comparison group. *See* Verizon Lacouture/Ruesterholz Decl. at para. 104 and Attach. 21.

[247] In its Order, the New York Commission states that the Carrier Working Group reached consensus to exclude misdirected dispatches from the MR-5 metric to more accurately capture performance for which Verizon is responsible. Specifically, the New York Commission modified the guidelines for the MR-5 measure to eliminate the so-called "double-trouble" phenomenon, which occurs when the competitive LEC misdirects Verizon to dispatch a technician either inside or outside the central office and no trouble is found. Verizon explains that when this occurs, the trouble ticket must be closed and the competitive LEC must initiate a second ("double") trouble ticket directing dispatch in the opposite direction. *See* New York Commission October Order at 4; *see also* Verizon Lacouture/Ruesterholz Decl. at para. 104.

[248] *See supra* n.225.

[249] Verizon missed parity from July-October. In July, Verizon completed POTS loop orders of 1-5 lines in 2.40 days for Verizon retail and 4.55 days for competitors. The comparable numbers for August were 2.51 for the Verizon retail affiliate and 6.27 for competitors and 4.28 for Verizon retail and 5.48 for competitors in September and 3.56 for Verizon retail and 4.84 for competitors in October. For November, performance data demonstrate that Verizon provisioned voice grade loops to competitors at parity with its own retail customers. *See* PR 2-03-3112 (Average Completed Interval – Dispatch (1-5 lines) – Loop).

[250] *See* PR 4-04-3113 (Percent Missed Appointment – Dispatch – Loop New). In the *Bell Atlantic New York Order*, the Commission found the missed rate of installation appointments to be the most accurate indicator of Bell Atlantic's ability to provision unbundled loops. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4103, para. 288.

[251] *See supra* part III.A.2.d.; Verizon Jan. 8 *Ex Parte* Letter at 2-3.

[252] The New York Commission has issued an order eliminating the average interval completed PR-2 measures from the Carrier-to-Carrier Performance Reports. *See* New York Commission October Order at 3. Specifically, the New York Commission indicates that the Carrier Working Group agreed to eliminate this metric because other metrics capture performance in this area: PR-1 captures the provisioning interval offered, while PR-3 Percent Completed Within X Days and PR-4 Missed Appointments adequately measure success meeting the promised interval. *Id.* In past orders, we have accorded much weight to the judgment of collaborative state proceedings and encouraged carriers to work together in such fora to resolve metrics and other issues. *See Verizon Massachusetts Order*, 16 FCC Rcd at 9057, para. 126.

about the accuracy of this metric, we find that the performance differences reported under this metric are relatively slight and do not appear to be competitively significant to competing LECs.[253] Indeed, no commenter has indicated that the provisioning of voice grade loops is a problem in Rhode Island. As the Commission has stated in the past, isolated cases of performance disparity, especially when the margin of disparity is small, generally will not result in a finding of checklist noncompliance.[254]

87. *High Capacity Loops*. Based on the record, we find, as did the Rhode Island Commission, that Verizon's performance complies with the requirements for checklist item four.[255] From July through September, Verizon provisioned approximately ten DS-1 loops in Rhode Island.[256] Because these volumes are insufficient upon which to make a finding, we look at Massachusetts data, which show that Verizon's performance with respect to high capacity loops meets the requirements of checklist item four.

88. We note that Verizon's performance in Massachusetts with respect to high capacity loops has generally improved since grant of section 271 authority in Massachusetts.[257] While the installation troubles reported and network trouble report rate in Massachusetts have been out of parity for competitive LECs for almost all reported months, we find that these disparities are slight and thus not competitively significant.[258] Moreover, given Verizon's generally acceptable performance for all other categories of loops, and recognizing that high capacity loops represent only a small percentage of overall loop orders in Rhode Island and Verizon's improved performance in regard to high capacity loops, we find that Verizon's performance is in compliance with checklist item four. We note that commenters in this proceeding do not criticize Verizon's performance with regard to high capacity loops.

89. *Line Sharing*. Based on the evidence in the record, we find, as did the Rhode Island Commission,[259] that Verizon demonstrates that it provides nondiscriminatory access to the

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[253] Verizon explains that the average completed interval for August through November in Rhode Island was 5.28 days for competitive LECs and 3.54 days for the retail comparison group, a difference of only 1.74 days. In addition, competitive LECs' average completed intervals in Rhode Island have decreased from August-November (6.27, 5.48, 4.84, and 4.80) even as competitive LEC volumes have generally increased (22, 33, 43, and 20). *See* Verizon Jan. 8 *Ex Parte* Letter at 4.

[254] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9055-56, para. 122.

[255] *See* Rhode Island Commission Comments at 133-36.

[256] *See* Verizon Application at 42. High capacity loops in Rhode Island represent less than 1% of all unbundled loops provisioned to competitors. *See id.*

[257] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9075-76, para. 156.

[258] For PR 6-01-3200 (Percent Installation Troubles Within 30 Days), Verizon performed slightly better for its own retail affiliate from July-September. In October, it performed at parity. For MR 2-01-3200 (Network Trouble Report Rate), Verizon states that during July, August and September, the percentages have generally been under 2%. In October, the percentage was under 2% as well. *See also* Verizon Lacouture/Ruesterholz Decl. at para. 126.

[259] *See* Rhode Island Commission Comments at 133-36.

high frequency portion of the loop.[260] Through September 2001, Verizon had completed approximately four line sharing orders in Rhode Island for unaffiliated competitive LECs[261] and the Rhode Island performance data show almost no competitive LEC activity for line shared DSL services in September and October.[262] Although there has been very little ordering activity in Rhode Island for line sharing for the months reported, there has been much ordering activity in Massachusetts during the same period of time.[263] Verizon's Massachusetts performance data demonstrate that it is provisioning line shared DSL loops to competitors at parity with its own retail provisioning, and that its maintenance and repair performance is also acceptable.[264]

90. *Line Splitting*. Based on the evidence in the record, we find, as did the Rhode Island Commission,[265] that Verizon complies with its line-splitting obligations and provides access to network elements necessary for competing carriers to provide line splitting.[266] Verizon provides access to the same pre-ordering capabilities to carriers that purchase line splitting as it

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[260] As part of KPMG's stand-alone testing in Rhode Island, KPMG evaluated Verizon's line sharing installations in Massachusetts to validate that Verizon's technicians performed all of the required tasks defined in the line sharing documentation. KMPG examined line sharing in Massachusetts rather than in Rhode Island because Massachusetts line sharing volumes were greater. *See* Verizon Lacouture/Ruesterholz Decl. at para. 176. Verizon received a "satisfied" rating based on KPMG Consulting evaluation criteria. *See* KPMG Report at 13. Specifically, during 78 ADSL Line Sharing installations, KPMG Consulting observed Verizon-MA technicians execute 624 installation tasks. Verizon-MA technicians executed 615 (99%) of these tasks as defined in their documentation. *See* KPMG Report at 93. We encourage state commissions and BOCs to engage in testing of new or changed aspects of a BOC's OSS. *See also* Verizon Lacouture/Ruesterholz Decl. at paras. 165-66.

[261] *See* Verizon Lacouture/Ruesterholz Decl. at para. 175.

[262] *See* the PR-6 Installation Quality metrics.

[263] Through September 2001, Verizon had completed over 3,600 line sharing orders for unaffiliated competitive LECs in Massachusetts. *See* Verizon Lacouture/Ruesterholz Decl. at para. 175.

[264] *See* PR 1-01-3343 (Average Interval Offered – Total No Dispatch) and PR 1-02-3343 (Average Interval Offered – Total Dispatch); PR 2-01-3343 (Average Interval Completed – Total No Dispatch) and PR 2-02-3343 (Average Interval Completed – Total Dispatch); and PR 4-05-3343 (Percent Missed Appointments – No Dispatch). For PR 6-01-3343 (Percent Installation Troubles Reported Within 30 Days), Verizon's performance with regard to installation troubles reported within 30 days in Massachusetts is out of parity for September and October, but from July-October, the rate of such installation troubles was less than 2% for both competing LECs and Verizon's own affiliate. *See* Verizon Lacouture/Ruesterholz Decl. at para. 188; *see also* MR 2-03-3343 (Network Trouble Report Rate – Central Office) and MR 4-03-3343 (Mean Time to Repair – Central Office Trouble).

[265] *See* Rhode Island Commission Comments at 133-36.

[266] *See Deployment of Wireline Services Offering Advanced Telecommunications Capabilities and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration, CC Docket No. 98-147; Fourth Report and Order on Reconsideration, CC Docket No. 96-98; Third Further Notice of Proposed Rulemaking, CC Docket No. 98-147; Sixth Further Notice of Proposed Rulemaking, CC Docket No. 96-98, 16 FCC Rcd 2101, 2111, para. 20. Verizon states, however, that it is not aware of any competitive LECs that are engaging in line splitting in Rhode Island or Massachusetts using existing network elements. *See* Verizon Lacouture/Ruesterholz Decl. at para. 193.

does to carriers that purchase unbundled DSL loops or line sharing.[267] In addition, working with the competitive LECs through the New York DSL Collaborative, Verizon implemented a permanent OSS process for line splitting throughout the Verizon East territory, including Rhode Island, on October 20, 2001.[268] Thus, Verizon has met its goal to implement permanent OSS by October 2001.[269] Competitive LECs have raised no complaints about this new process. We find, therefore, given the record before us, that Verizon's process for line-splitting orders is in compliance with the requirements of this checklist item at this time.[270] As competing LEC needs continue to evolve, however, we may revisit Verizon's line splitting OSS in a future section 271 proceeding that includes more or different evidence in the record.

3. Checklist Item 5 – Transport

91. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[271] Based on our review of the record,[272] we conclude, as did the Rhode Island Commission,[273] that Verizon complies with the requirements of this checklist item.

92. In past orders, the Commission has relied on the missed appointment rate to determine whether a BOC is provisioning transport to its competitors in a nondiscriminatory fashion.[274] The volume of transport orders in Rhode Island is extremely low,[275] but Verizon's

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[267] Competitive LECs have a choice of submitting pre-ordering queries over either the Web GUI, EDI, or CORBA electronic interfaces. *See* Verizon McLean/Wierzbicki Decl. Attach. 2 at 11.

[268] Specifically, Verizon began offering new OSS functionality that enables a competitor to submit a single Local Service Request (LSR) to add DSL capability to a loop in an existing UNE-Platform arrangement while re-using the same network elements, including the loop, if it is DSL-capable. In addition, Verizon implemented the ability for a competitive LEC to convert from line sharing to line splitting using a single LSR, or drop data from a line-splitting arrangement and revert back to UNE-Platform with a single LSR. *See* Verizon Lacouture/Ruesterholz Decl. at para. 202; *see also* Verizon McLean/Wierzbicki Decl. Attach. 2 at 12.

[269] *See Verizon Massachusetts Order*, 16 FCC Rcd at 9091-92, para. 181 (Verizon agreed to an implementation schedule to offer line splitting-specific OSS capabilities under the supervision of the New York Commission in response to concerns raised by WorldCom.).

[270] As of November 9, 2001, Verizon had received 10 commercial line splitting orders from competitive LECs (utilizing the new line splitting OSS capabilities) outside of the pilot. None of these orders was submitted in Rhode Island or Massachusetts. *See* Verizon Lacouture/Ruesterholz Decl. at para. 202.

[271] 47 U.S.C. § 271(c)(2)(B)(v); *see also* Appendix D at para. 53.

[272] *See* Verizon Application at 46-47, and Exh. A; Verizon Lacouture/Ruesterholz Decl. at paras. 236-47.

[273] Rhode Island Commission Comments at 144.

[274] *See, e.g.*, *Verizon Massachusetts Order*, 16 FCC Rcd at 9106-07, para. 210.

[275] Verizon provisioned 21 orders to competitors from July through October, but only one retail DS3 order – the accepted retail analogue for this metric – during the same period. *See* PR-4-01-3530 (% missed appointments – (continued….)

performance for this metric in Massachusetts during July through October shows that Verizon missed fewer appointments provisioning transport to its competitors than for its own retail customers.[276]

93. We disagree with CTC's argument that Verizon's dark fiber offering does not comply with the requirements of this checklist item. CTC argues that we should condition Verizon's section 271 authority on Verizon's compliance with a recent Rhode Island Commission order that requires Verizon "to splice dark fiber at any technically feasible point so as to make dark fiber continuous through one or more intermediate central offices without requiring a CLEC to be collocated at any such intermediate office."[277] We reject CTC's claim. Verizon has amended its tariff in Rhode Island to accommodate these new requirements effective February 1, 2002,[278] and the time to appeal the order in Rhode Island has elapsed.[279] CTC also argues generally that Verizon's dark fiber offering does not satisfy section 251(c)(3).[280] CTC does not, however, support its assertions with references to our rules or precedent. We will not find noncompliance based on such vague assertions.

4. Checklist Item 14 – Resale

94. Section 271(c)(2)(B)(xiv) of the Act requires that a BOC make "[t]elecommunications services . . . available for resale in accordance with the requirements of section 251(c)(4) and section 252(d)(3).[281] Based on the record in this proceeding, we conclude,

(Continued from previous page)
Verizon – Total-IOF). It is thus not possible to determine, based on this metric, whether Verizon's transport provisioning has been nondiscriminatory. We note, however, that Verizon missed only 14% of appointments for competitors during this period. *See id.*

[276] *See* PR-4-01-3530 (% missed appointments – Verizon – Total-IOF). In July 2001, Verizon missed 50% of its appointments for its own customers, but only 3.23% of those for its competitors. Figures for August, September and October, 2001, are similar: 66.67% vs. 2.38%; 80% vs. no appointments missed; and 66.67% vs. no appointments missed, respectively.

[277] CTC Comments at 8-9 (quoting Letter from Clint Odom, Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Dec. 4, 2001), Attach. at 19 (*Rhode Island PUC Dec. 3 Order*)).

[278] *See* Letter from Clint Odom, Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 (filed Dec. 19, 2001) (*Verizon New England Inc. Rates and Charges Effective in the State of Rhode Island PUC RI No. 18*), at Part 10.2.1.G ("The Telephone Company will not require collocation at an intermediate office if it can provide intermediate cross connections between fiber distribution frames or can splice fibers at any technically feasible point in the intermediate office(s).").

[279] "We note that the time for VZ-RI to appeal our decision on dark fiber has expired pursuant to R.I.G.L. § 39-5-1. In addition, on December 14, 2001, VZ-RI made a compliance filing in conformity with our order regarding dark fiber." Rhode Island Commission Reply at 4 (footnotes omitted).

[280] *See* CTC Comments at 11.

[281] 47 U.S.C. § 271(c)(2)(B)(xiv); *see* Appendix D at para. 67.

as did the Rhode Island Commission,[282] that Verizon satisfies the requirements of this checklist item in Rhode Island.[283] Importantly, none of the commenting parties questions Verizon's showing of compliance with the requirements of this checklist item, including the area of resale of Verizon Advanced Data Inc.'s (VADI) retail DSL-based telecommunications service offering (DSL resale).[284]

95. We conclude that Verizon demonstrates current compliance with the checklist requirements with regard to DSL resale as articulated in our recent section 271 orders.[285] First, Verizon already offers the resale of DSL services when Verizon provides voice services on the line involved.[286] Second, in accordance with the United States Court of Appeals decision in *ASCENT v. FCC*, VADI has made enhancements to its federal tariff. Specifically, VADI has made resold DSL over resold voice lines, Verizon's expanded DSL resale offering, available in Rhode Island.[287] This offering became effective November 21, 2001 and is the same as that in Connecticut and Pennsylvania except for certain implementation details.[288] Verizon has also implemented OSS changes that enable Verizon to receive VADI's expanded DSL resale orders via the EDI interface and to track those orders through the provisioning process.[289]

96. We also conclude that Verizon has appropriate resold DSL order processing procedures in place. In the *Verizon Connecticut Order*, the Commission indicated that several

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[282] *See* Rhode Island Commission Comments at 186-88.

[283] Verizon has a concrete and specific legal obligation in its interconnection agreements and tariffs to make its retail services available for resale to competing carriers at wholesale rates. *See* Verizon Application at 56, n.52; Verizon Lacouture/Ruesterholz Decl. at para. 386.

[284] In this proceeding, unlike in the *SWBT Arkansas/Missouri Order*, no party, including Verizon, has questioned the applicability of § 251(c)(4) to VADI's DSL resale service. *Cf. SWBT Arkansas/Missouri Order*, 16 FCC Rcd at 20758-59, paras. 79-81.

[285] *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17471, para. 94; *Verizon Connecticut Order*, 16 FCC Rcd at 14164-65, para. 39.

[286] *See* Verizon F.C.C. Tariff No. 20, Section 5.1.

[287] *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2000); *see also* Tariff Revision filed by VADI to VADI F.C.C. Tariff F.C.C. No. 1 under Transmittal Number 22 (Nov. 20, 2001).

[288] *See* Verizon Lacouture/Ruesterholz Decl. at para. 416. Verizon uses the same checklist-compliant processes and procedures to provide this new service as it uses in Pennsylvania, except that, in Rhode Island, Verizon has not placed any limits on the number of orders that Verizon will commit to process each day. *See* Verizon Application at 57-58.

[289] Verizon Lacouture/Ruesterholz Decl. at para. 417. Despite these enhancements in the former Bell Atlantic states where VADI operates, no reseller has submitted orders – other than test orders – to Verizon for resold DSL over resold voice lines service. Only six test orders were submitted and they were completed successfully by Verizon. *See* Letter from Clint E. Odom, Director, Federal Regulatory, Verizon to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 at 3 (filed Jan. 7, 2002) (Verizon Jan. 7 *Ex Parte* Letter).

aspects of Verizon's expanded DSL resale OSS should be revised as Verizon develops permanent order processing procedures.[290] Verizon addresses each of these issues, but concedes that its permanent ordering procedures continue to evolve.[291] As a result, it has not yet developed permanent ordering procedures that fully satisfy all three expectations in Rhode Island. Because no carrier has placed an order for resold DSL in Rhode Island, however, and no carrier commented on this issue in this proceeding, we have no basis for evaluating whether the absence of these changes has any impact on competition. Moreover, as explained below, we accept Verizon's explanation regarding why it has not fully implemented these changes, for the purpose of this proceeding. In particular, the Commission expected that Verizon's performance in providing an expanded DSL resale offering would be reflected in its performance data.[292] Verizon indicates that it has implemented enhancements to its systems to allow it to capture performance data for its resold DSL over resold voice lines offering, and it will begin reporting data after performance measures are developed by the states.[293] The Commission also expected that permanent ordering procedures would eliminate Verizon's requirement that it disconnect resold DSL service if the customer switches from the reseller back to Verizon as the underlying voice provider.[294] Verizon indicates that, to date, it has not received any such requests, but it confirms that it will work to avoid any disconnection when it begins receiving orders.[295] Lastly, the Commission expected that permanent order processing procedures would eliminate Verizon's requirement that the reseller must already be the voice provider on the line involved before Verizon can process orders for DSL resale.[296] According to Verizon, however, the voice service must be established first because the data provider is considered a "sub-tenant" on the line involved.[297] Verizon indicates that this is true whether Verizon, a competitive LEC, or a reseller is the voice provider.[298]

C. Remaining Checklist Items (3, 6-13)

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290 *See Verizon Connecticut Order*, 16 FCC Rcd at 14166, para. 42.

291 *See* Verizon Jan. 7 *Ex Parte* Letter at 3-4.

292 *See Verizon Connecticut Order*, 16 FCC Rcd at 14166, para. 42.

293 *See* Verizon Jan. 7 *Ex Parte* Letter at 4. However, as Verizon also notes, performance measures specific to resold DSL over resold voice lines have yet to be developed in the state collaboratives. *Id.*

294 *See Verizon Connecticut Order*, 16 FCC Rcd at 14166, para. 42.

295 According to Verizon, "[it] has not received any orders where an end user seeks to switch its voice service back to Verizon while retaining the reseller providing DSL service. Nevertheless, if such an order were received, Verizon would endeavor to complete the order without disconnection of the DSL service." *See* Verizon Jan. 7 *Ex Parte* Letter at 4

296 *Id.*

297 According to Verizon, "when voice and data are established on a single line, the voice provider controls the line, and the data provider is a sub-tenant. As a result, the voice service must be established first." *Id.*

298 *Id.*

97. In addition to showing that it is in compliance with the requirements discussed above, an applicant under section 271 must demonstrate that it complies with checklist item 3 (access to poles, ducts, and conduits),[299] item 6 (unbundled local switching),[300] item 7 (911/E911 access and directory assistance/operator services),[301] item 8 (white pages directory listings),[302] item 9 (numbering administration),[303] item 10 (databases and associated signaling),[304] item 11 (number portability),[305] item 12 (local dialing parity),[306] and item 13 (reciprocal compensation).[307] Based on the evidence in the record, we conclude that Verizon demonstrates that it is in compliance with these checklist items in Rhode Island.[308] We also note that the Rhode Island Commission concludes that Verizon complies with the requirements of each of these checklist items.[309] None of the commenting parties challenges Verizon's compliance with these checklist items.

IV. COMPLIANCE WITH SECTION 271(C)(1)(A)

98. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or section 271(c)(1)(B) (Track B).[310] To qualify for Track A, a

[299] 47 U.S.C. § 271(c)(2)(B)(iii).

[300] *Id.* § 271(c)(2)(B)(vi).

[301] *Id.* § 271(c)(2)(B)(vii).

[302] *Id.* § 271(c)(2)(B)(viii).

[303] *Id.* § 271(c)(2)(B)(ix).

[304] *Id.* § 271(c)(2)(B)(x).

[305] *Id.* § 271(c)(2)(B)(xi).

[306] *Id.* § 271(c)(2)(B)(xii).

[307] *Id.* § 271(c)(2)(B)(xiii).

[308] *See* Verizon Application at 49 (checklist item 3), 45 (checklist item 6), 49-51 (checklist item 7), 52-53 (checklist item 8), 53 (checklist item 9), 53-54 (checklist item 10), 54-55 (checklist item 11), 55 (checklist items 12 and 13); Lacouture/Ruesterholz Decl. at paras. 268-91 (checklist item 3), paras. 211-35 (checklist item 6), paras. 292-324 (checklist item 7), paras. 325-41 (checklist item 8), paras. 342-46 (checklist item 9), paras. 347-72 (checklist item 10), paras. 373-76 (checklist item 11), paras. 378-82 (checklist item 12), paras. 383-86 (checklist item 13); *see also* Appendices B and C.

[309] *See* Rhode Island Commission Comments at 95-102 (checklist item 3), 145-54 (checklist item 6), 154-62 (checklist item 7), 162-64 (checklist item 8), 165-66 (checklist item 9), 166-71 (checklist item 10), 172-74 (checklist item 11), 174-77 (checklist item 12), 177-80 (checklist item 13).

[310] 47 U.S.C. § 271(d)(3)(A).

BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business customers."[311]

99. We conclude, as the Rhode Island Commission did,[312] that Verizon satisfies the requirements of Track A in Rhode Island. We base this decision on interconnection agreements Verizon has with Cox Communications, Inc. (Cox), Network Plus, Choice One, WorldCom, Conversent, and AT&T.[313] Cox and Network Plus provide telephone exchange service to a substantial number of residential and business subscribers in Rhode Island predominantly over their own facilities.[314] Choice One, WorldCom, Conversent, and AT&T serve business customers.

100. We conclude that a sufficient number of residential and business customers are being served by competing LECs through the use of their own facilities to demonstrate that there is an actual commercial alternative in Rhode Island. Verizon has shown that facilities-based carriers serve more than a *de minimis* number of residential and business customers in Rhode Island.[315] No commenter has challenged Verizon's assertion that it satisfies the requirements for Track A in Rhode Island.

V. SECTION 272 COMPLIANCE

101. Section 271(d)(3)(B) provides that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[316] Based on the record, we conclude that Verizon has demonstrated that it will comply with the requirements of section 272.[317] Significantly, Verizon provides evidence that it maintains the same structural separation and nondiscrimination safeguards in Rhode Island as it does in Pennsylvania, New York, Connecticut, and Massachusetts – states in which Verizon has already received section 271 authority.[318] No party challenges Verizon's section 272 showing.[319]

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311 47 U.S.C. § 271(c)(1)(A).

312 Rhode Island Commission Comments at 10.

313 Verizon Application at 7-11; Verizon Local Competition Report (*citing confidential portion*) paras. 31-32, 35-44 .

314 *Id.*

315 Verizon Application at 7-11; Verizon Local Competition Report (*citing confidential portion*) paras. 31-32, 35-44. *Cf. SWBT Oklahoma Order*, 12 FCC Rcd at 8695, para. 14.

316 47 U.S.C. § 271(d)(3)(B); Appendix D at paras. 68-69.

317 *See* Verizon Application at 73-78; Verizon Application App. A, Vol. 3, Tab E, Declaration of Susan C. Browning at para 4. (Verizon Browning Decl.).

318 *Verizon Pennsylvania Order*, 16 FCC Rcd at 17486, para. 124; *Verizon Connecticut Order*, 16 FCC Rcd at 14179, para. 73; *Verizon Massachusetts Order*, 16 FCC Rcd at 9114-17, paras. 226-31; *Bell Atlantic New York* (continued….)

VI. PUBLIC INTEREST ANALYSIS

102. Apart from determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.[320] At the same time, section 271(d)(4) of the Act states in full that "[t]he Commission may not, by rule or otherwise, limit or extend the terms used in the competitive checklist set forth in subsection (c)(2)(B)."[321] Accordingly, although the Commission must make a separate determination that approval of a section 271 application is "consistent with the public interest, convenience, and necessity," it may neither limit nor extend the terms of the competitive checklist of section 271(c)(2)(B). Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will serve the public interest as Congress expected.

103. We conclude that approval of this application is consistent with the public interest. From our extensive review of the competitive checklist, which embodies the critical elements of market entry under the Act, we find that barriers to competitive entry in the local exchange markets have been removed and the local exchange markets today are open to competition. We further find that the record confirms our view, as noted in prior section 271 orders, that BOC entry into the long distance market will benefit consumers and competition if the relevant local exchange market is open to competition consistent with the competitive checklist.[322]

104. We disagree with commenters that assert that under our public interest standard, we must consider the market share of each entry strategy for each type of service. Sprint argues that low levels of residential UNE and resale service in Rhode Island indicate that meaningful

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Order, 15 FCC Rcd at 4152-61, paras. 401-21; Verizon Application at 73-78; Verizon Browning Decl. at paras. 4-17.

[319] We recognize that the first independent audit of Verizon's section 272 compliance conducted pursuant to section 53.209 of the Commission's rules is now complete. *See* Letter from PricewaterhouseCoopers LLP to Magalie Roman Salas, Secretary, Federal Communications Commission (June 11, 2001) (transmitting audit report). While the audit raises issues that may require further investigation, the audit results are not a legal determination of Verizon's section 272 compliance. Parties were required to submit comments on the audit report no later than January 24, 2002. *See Accounting Safeguards Under the Telecommunications Act of 1996*, Order, 16 FCC Rcd 20301 (2001) (extending deadline for filing comments). Because the Commission will not have had the opportunity to complete its own review of the audit results before it is required to issue a decision on this section 271 application, and because no party cites the audit findings as evidence of noncompliance (or even challenges Verizon's showing generally), there is no reason to consider the audit as evidence of shortcomings in Verizon's section 272 compliance.

[320] 47 U.S.C. § 271(d)(3)(C); Appendix D at paras. 70-71.

[321] *Id.* § 271(d)(4).

[322] *See SWBT Texas Order*, 15 FCC Rcd at 18558-89, para. 419.

competition does not exist in Rhode Island.[323] Given an affirmative showing that the competitive checklist has been satisfied, low customer volumes in any one particular mode of entry or in general do not necessarily undermine that showing. As the Commission has said in previous section 271 orders, factors beyond the control of the BOC, such as individual competitive LEC entry strategies, might explain a low residential customer base.[324]

105. We also disagree with Sprint's argument that Cox does not provide meaningful competition with respect to customers who do not subscribe to Cox's cable or data services, since the price for cable telephony to those customers exceeds Verizon's price for local service.[325] Sprint notes that Cox currently offers cable telephony at a low price for its cable or data subscribers.[326] Customers who want cable telephony without Cox's cable or data offering pay a higher price for this service.[327] We are not persuaded by Sprint's argument. Cox has the capability to provide cable telephony service to 75 to 95 percent of Rhode Island customers, and a substantial number of those potential customers have in fact chosen Cox as their local telephone carrier.[328] The fact that a substantial number of residential customers have chosen Cox to provide their local phone service provides us with assurance that Cox is a meaningful competitor to Verizon.[329]

106. Sprint also argues that the fact that the BOCs have generally chosen not to compete against each other out of region (particularly against Verizon in Rhode Island) and the continuing bankruptcy of competitive LECs mean that the public interest is not served by granting Verizon section 271 approval in Rhode Island.[330] We reject these arguments. Factors beyond the control of the applicant, such as a weak economy, individual competing LEC and out-of-region BOC business plans, or poor business planning by potential competitors can explain the lack of entry into a particular market.

A. Price Squeeze Arguments

107. Given Verizon's substantial voluntary reduction of its Rhode Island switching rates, we find that AT&T, WorldCom, and ASCENT have not established the existence of a price squeeze in Rhode Island such that grant of Verizon's application would violate section

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323 *See* Sprint Comments at 7-11.

324 *See Verizon Pennsylvania Order*, 16 FCC Rcd at 17487, para. 126.

325 Sprint Comments at 8-9.

326 *Id.* at 9.

327 *Id.* at 8-9.

328 Verizon Application at 9-10 (citing confidential portions).

329 *See* Verizon Local Competition Report (*citing confidential portion*), paras. 31-32.

330 Sprint Comments at 4-7.

271's public interest requirement.[331] In *Sprint Communications Co. L.P. v. FCC,*[332] the Court of Appeals for the D.C. Circuit remanded to the Commission for further consideration how allegations of a price squeeze by a BOC should be examined as part of a section 271 application's public interest analysis. In the Commission's *SWBT Kansas/Oklahoma Order,* the Commission declined to consider allegations that a section 271 applicant should fail the 14-point checklist because competitors are unable to make a profit in the residential market via the UNE-Platform.[333] We need not address the issues raised in these proceedings in this order. We have examined AT&T and WorldCom's price squeeze claims[334] and, determined that, even if we accept their assertion that a price squeeze analysis is mandated by section 271's public interest requirement and their framework for determining whether a price squeeze exists, there is no price squeeze in Rhode Island. Using AT&T and WorldCom's calculation of anticipated profit margins on UNE-Platform-based, residential service in Rhode Island, these profit margins are significantly higher when recalculated using the new Rhode Island rates. Neither AT&T, WorldCom, nor ASCENT argued that there was a price squeeze in Rhode Island when the Rhode Island Commission adopted Verizon's February 21 switching rates. Therefore, we conclude that Verizon's Rhode Island UNE rates do not create a price squeeze such that grant of its section 271 application would not be in the public interest.

B. Assurance of Future Compliance

108. As set forth below, we find that the performance assurance plan ("PAP") currently in place in Rhode Island will provide assurance that the local market will remain open after Verizon receives section 271 authorization.[335] We have examined certain key aspects of Verizon's PAP and we find that the plan falls within a zone of reasonableness and is likely to provide incentives that are sufficient to foster post-entry checklist compliance. The Rhode Island Commission adopted a self-executing PAP, modeled on the PAP adopted in Massachusetts and New York, that exposes Verizon to the same level of liability as in Massachusetts.[336] While the Massachusetts and New York PAPs form the basis for the Rhode

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[331] AT&T Comments at 17, AT&T Reply Comments at 4-9; Letter from Peter D. Keisler, Sidley Austin Brown & Wood, LLP, to William F. Caton, Acting Secretary, Federal Communications Commission dated Feb. 8, 2002 at 2-13 and Supplemental Declaration of Michael Lieberman at 2-11, paras. 3-26 and various Exhibits; WorldCom Reply Comments at 1-5 and Reply Declaration of Vijetha Huffman at 3-4, paras. 7-9 and Attachment 1; ASCENT Comments at 2-4.

[332] *Sprint Communications Co. L.P. v. FCC,* 274 F.3d 549 (D.C. Cir. 2001).

[333] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6269, para. 65 and 6280-81, para. 92.

[334] While ASCENT also raised price squeeze concerns, it did not supply specific alleged profit margins that we can evaluate in this proceeding.

[335] *Ameritech Michigan Order*, 12 FCC Rcd at 20748-50, paras. 393-98. We note that in all of the previous applications that we have granted to date, the applicant was subject to an enforcement plan administered by the relevant state commission to protect against backsliding after BOC entry into the long-distance market.

[336] *Rhode Island PUC C2C and PAP Order* at 35. The Massachusetts and Rhode Island PAPs place 39% of Verizon's yearly net income for each state at risk.

Island PAP, the Rhode Island PAP differs from those PAPs in certain details to reflect the specific concerns of competitive LECs doing business in Rhode Island.[337] The Rhode Island Commission decided to distribute penalty amounts differently among the metrics, including placing penalties on missed critical billing metrics and doubling the penalty amount allocated to UNE flow through. Additionally, the Rhode Island Commission ordered the creation of several new metrics including a critical measure for 2-wire digital loops and 2-wire xDSL loops. Also, the Rhode Island PAP has created small sample size tables for benchmark metrics with standards of 80 percent, 85 percent, 90 percent, and 95 percent, while the other PAPs only include such a table for metrics with a benchmark standard of 95 percent. We conclude that the Rhode Island modifications appear reasonable and do not detract from the overall effectiveness of the plan. The Rhode Island Commission also has the authority to reallocate the monthly distribution of bill credits among any provisions of the PAP and adopt new metrics if there is a specific concern to Rhode Island competitive LECs.[338]

109. As in prior section 271 orders, our conclusions are based on a review of several key elements in any performance remedy plan: total liability at risk in the plan; performance measurement and standards definitions; structure of the plan; self-executing nature of remedies in the plan; data validation and audit procedures in the plan; and accounting requirements.[339] We discuss only those elements that commenters have raised in the record before us.

110. We disagree with AT&T that the Rhode Island Commission's PAP does not adequately address the issue of small samples. Specifically, AT&T is concerned that Verizon is temporarily using less accurate statistical tests (t tests and binomial tests) that are easier to administer, rather than the permutation test, which is computationally more difficult but is more accurate.[340] Additionally, AT&T questions why permutation tests are not being done in Rhode Island, given that AT&T believes that Verizon is currently doing permutation tests in an automated fashion in other states.[341] In its reply, Verizon clarifies that it is not currently using an automated permutation test in New York or any other former Bell Atlantic state.[342] Verizon further clarifies that it currently uses permutation tests in a manual, or case-by-case basis, when

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337 Rhode Island Commission Comments at 189.

338 *Rhode Island PUC C2C and PAP Order* at 10, 44-45.

339 *See, e.g.*, *Verizon Massachusetts Order*, 16 FCC Rcd at 9121-25, paras. 240-49; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6377-81, paras. 273-80.

340 "If the performance is worse for the CLEC than Verizon-RI, Verizon RI will use the t distribution or binomial (counted or measured) until such time as a permutation test can be run in an automated fashion." Letter from Bruce P. Beausejour, Vice President and General Counsel – New England, Verizon, to Luly E. Massaro, Commission Clerk, Rhode Island Public Utilities Commission, Docket No. 3256 at Appendix D, 2. (filed Dec. 6, 2001) (*RI PAP*).

341 "It is AT&T's understanding that Verizon is currently running automated permutation tests for its wholesale operations in New York." AT&T Comments at 18.

342 Verizon Reply, App. A, Reply Declaration of Elaine M. Guerard, Julie A. Canny, and Beth A. Abesamis at para. 8 (Verizon Guerard/Canny/Abesamis Reply Decl.).

appropriate.[343] Verizon plans to automate the permutation test by the end of 2002.[344] Moreover, there is an exception provision in the Rhode Island PAP that "allows a CLEC to raise issues relating to a metric with a small sample size."[345] And we are reassured by the Rhode Island Commission's determination that it "will accept Verizon's proposed statistical methodology but reserves the right to modify it in the future."[346]

VII. SECTION 271(d)(6) ENFORCEMENT AUTHORITY

111. Section 271(d)(6) of the Act requires Verizon to continue to satisfy the "conditions required for . . . approval" of its section 271 application after the Commission approves its application.[347] Thus, the Commission has a responsibility not only to ensure that Verizon is in compliance with section 271 today, but also that it remains in compliance in the future. As the Commission has already described the post-approval enforcement framework and its section 271(d)(6) enforcement powers in detail in prior orders, it is unnecessary to do so again here.[348]

112. Working in concert with the Rhode Island Commission, we intend to monitor closely Verizon's post-approval compliance for Rhode Island to ensure that Verizon does not "cease[] to meet any of the conditions required for [section 271] approval."[349] We stand ready to exercise our various statutory enforcement powers quickly and decisively in appropriate

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[343] Verizon Guerard/Canny/Abesamis Reply Decl. at paras. 7-8. And as Verizon further explained:

> If Verizon's performance for the CLECs is worse than Verizon's performance for the retail comparison group, then:
>
> - For average measurements (measured variables), Verizon will run a permutation test whenever the sample size for the CLEC observations or the retail comparison group is less than 30
>
> - For percentage measurements (counted variables), Verizon will employ Fisher's Exact Test, whenever the result of the equation $n \cdot p(1\text{-}p)$ is less than 5 for either the CLECs or the retail comparison group (where n is the number of observations and p is the reported percentage).

Letter from Clint E. Odom, Director, Federal Regulatory, Verizon, to Magalie Roman Salas, Secretary, Federal Communications Commission, CC Docket No. 01-324 at 2 (filed Jan. 17, 2002).

[344] Verizon Guerard/Canny/Abesamis Reply Decl. at para. 9.

[345] *Rhode Island PUC C2C and PAP Order* at 43.

[346] *Rhode Island PUC C2C and PAP Order* at 43.

[347] 47 U.S.C. § 271(d)(6).

[348] *See, e.g.*, *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6382-84, paras. 283-85; *SWBT Texas Order*, 15 FCC Rcd at 18567-68, paras. 434-36; *Bell Atlantic New York Order*, 15 FCC Rcd at 4174-77, paras. 446-53.

[349] 47 U.S.C. § 271(d)(6)(A).

circumstances to ensure that the local market remains open in Rhode Island. We are prepared to use our authority under section 271(d)(6) if evidence shows market opening conditions have not been maintained.

113. We require Verizon to report to the Commission all Rhode Island carrier-to-carrier performance metrics results and Performance Assurance Plan monthly reports beginning with the first full month after the effective date of this Order, and for each month thereafter for one year unless extended by the Commission. These results and reports will allow us to review, on an ongoing basis, Verizon's performance to ensure continued compliance with the statutory requirements. We are confident that cooperative state and federal oversight and enforcement can address any backsliding that may arise with respect to Verizon's entry into the Rhode Island long distance market.[350]

VIII. CONCLUSION

114. For the reasons discussed above, we GRANT Verizon's application for authorization under section 271 of the Act to provide in-region, interLATA services in the State of Rhode Island and Providence Plantations.

IX. ORDERING CLAUSES

115. Accordingly, IT IS ORDERED that, pursuant to sections 4(i), 4(j), and 271 of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i), 154(j), and 271, Verizon's application to provide in-region, interLATA service in the State of Rhode Island and Providence Plantations, filed on November 26, 2001, IS GRANTED.

116. IT IS FURTHER ORDERED that this Order SHALL BECOME EFFECTIVE March 4, 2002.

FEDERAL COMMUNICATIONS COMMISSION

[350] *See, e.g.*, *Bell Atlantic-New York, Authorization Under Section 271 of the Communications Act To Provide In-Region, InterLATA Service in the State of New York*, Order, 15 FCC Rcd 5413-23 (2000) (adopting consent decree between the Commission and Bell Atlantic that included provisions for Bell Atlantic to make a voluntary payment of $3,000,000 to the United States Treasury, with additional payments if Bell Atlantic failed to meet specific performance standards and weekly reporting requirements to gauge Bell Atlantic's performance in correcting the problems associated with its electronic ordering systems).

William F. Caton
Acting Secretary

Appendix A
Commenters in CC Docket No. 01-324

Comments	Abbreviation
Association of Communications Enterprises	ASCENT
AT&T	AT&T
CTC Communications Corporation	CTC
Department of Justice	Department of Justice
Rhode Island Public Utilities Commission	Rhode Island Commission
Sprint Communications Company	Sprint
WorldCom	WorldCom

Letter Commenters in CC Docket No. 01-324

Rhode Island Urban-League

Honorable Patrick J. Kennedy, Congressman

Honorable Lincoln Almond, Governor of the State of Rhode Island

Honorable Charles J. Fogarty, Lieutenant Governor of Rhode Island

Sheldon Whitehouse, Attorney General of the State of Rhode Island

Reply Commenters

Replies	
AT&T	AT&T
Rhode Island Public Utilities Commission	Rhode Island Commission
Verizon	Verizon
WorldCom	WorldCom

Supplemental Reply Comments

AT&T	AT&T
Association of Communications Enterprises	ASCENT

Appendix B
Rhode Island Performance Data

Appendix C
Massachusetts Performance Data

Appendix D
Statutory Requirements

I. STATUTORY FRAMEWORK

1. The 1996 Act conditions BOC entry into the market for provision of in-region interLATA services on compliance with certain provisions of section 271.[1] BOCs must apply to the Federal Communications Commission (Commission or FCC) for authorization to provide interLATA services originating in any in-region state.[2] The Commission must issue a written determination on each application no later than 90 days after receiving such application.[3] Section 271(d)(2)(A) requires the Commission to consult with the Attorney General before making any determination approving or denying a section 271 application. The Attorney General is entitled to evaluate the application "using any standard the Attorney General considers appropriate," and the Commission is required to "give substantial weight to the Attorney General's evaluation."[4]

2. In addition, the Commission must consult with the relevant state commission to verify that the BOC has one or more state-approved interconnection agreements with a facilities-based competitor, or a Statement of Generally Available Terms and Conditions (SGAT), and that either the agreement(s) or general statement satisfy the "competitive checklist."[5] Because the Act does not prescribe any standard for the consideration of a state commission's verification under section 271(d)(2)(B), the Commission has discretion in each section 271 proceeding to

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[1] For purposes of section 271 proceedings, the Commission uses the definition of the term "Bell Operating Company" contained in 47 U.S.C. § 153(4).

[2] 47 U.S.C. § 271(d)(1). For purposes of section 271 proceedings, the Commission utilizes the definition of the term "in-region state" that is contained in 47 U.S.C. § 271(i)(1). Section 271(j) provides that a BOC's in-region services include 800 service, private line service, or their equivalents that terminate in an in-region state of that BOC and that allow the called party to determine the interLATA carrier, even if such services originate out-of-region. *Id.* § 271(j). The 1996 Act defines "interLATA services" as "telecommunications between a point located in a local access and transport area and a point located outside such area." *Id.* § 153(21). Under the 1996 Act, a "local access and transport area" (LATA) is "a contiguous geographic area (A) established before the date of enactment of the [1996 Act] by a [BOC] such that no exchange area includes points within more than 1 metropolitan statistical area, consolidated metropolitan statistical area, or State, except as expressly permitted under the AT&T Consent Decree; or (B) established or modified by a [BOC] after such date of enactment and approved by the Commission." *Id.* § 153(25). LATAs were created as part of the Modification of Final Judgment's (MFJ) "plan of reorganization." *United States v. Western Elec. Co.*, 569 F. Supp. 1057 (D.D.C. 1983), *aff'd sub nom. California v. United States*, 464 U.S. 1013 (1983). Pursuant to the MFJ, "all [BOC] territory in the continental United States [was] divided into LATAs, generally centering upon a city or other identifiable community of interest." *United States v. Western Elec. Co.*, 569 F. Supp. 990, 993-94 (D.D.C. 1983).

[3] 47 U.S.C. § 271(d)(3).

[4] *Id*. § 271(d)(2)(A).

[5] *Id*. § 271(d)(2)(B).

determine the amount of weight to accord the state commission's verification.[6] The Commission has held that, although it will consider carefully state determinations of fact that are supported by a detailed and extensive record, it is the FCC's role to determine whether the factual record supports the conclusion that particular requirements of section 271 have been met.[7]

3. Section 271 requires the Commission to make various findings before approving BOC entry. In order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate, with respect to each state for which it seeks authorization, that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[8] In order to obtain authorization under section 271, the BOC must also show that: (1) it has "fully implemented the competitive checklist" contained in section 271(c)(2)(B);[9] (2) the requested authorization will be carried out in accordance with the requirements of section 272;[10] and (3) the BOC's entry into the in-region interLATA market is "consistent with the public interest, convenience, and necessity."[11] The statute specifies that, unless the Commission finds that these criteria have been satisfied, the Commission "shall not approve" the requested authorization.[12]

II. PROCEDURAL AND ANALYTICAL FRAMEWORK

4. To determine whether a BOC applicant has met the prerequisites for entry into the long distance market, the Commission evaluates its compliance with the competitive checklist,

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6 *Bell Atlantic New York Order*, 15 FCC Rcd at 3962, para. 20; *Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended*, CC Docket No. 97-137, 12 FCC Rcd 20543, 20559-60 (1997) (*Ameritech Michigan Order*). As the D.C. Circuit has held, "[a]lthough the Commission must consult with the state commissions, the statute does not require the Commission to give State Commissions' views any particular weight." *SBC Communications Inc. v. FCC*, 138 F.3d 410, 416 (D.C. Cir. 1998).

7 *Ameritech Michigan Order*, 12 FCC Rcd at 20560; *SBC Communications v. FCC*, 138 F.3d at 416-17.

8 47 U.S.C. § 271(d)(3)(A). See Section III, *infra*, for a complete discussion of Track A and Track B requirements.

9 *Id.* §§ 271(c)(2)(B), 271(d)(3)(A)(i).

10 *Id.* § 272; *see Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *recon.*, Order on Reconsideration, 12 FCC Rcd 2297 (1997), *review pending sub nom.*, *SBC Communications v. FCC*, No. 97-1118 (D.C. Cir., filed Mar. 6, 1997) (held in abeyance pursuant to court order filed May 7, 1997), *remanded in part sub nom.*, *Bell Atlantic Telephone Companies v. FCC*, No. 97-1067 (D.C. Cir., filed Mar. 31, 1997), *on remand*, Second Order on Reconsideration, FCC 97-222 (rel. June 24, 1997), *petition for review denied sub nom. Bell Atlantic Telephone Companies v. FCC*, 113 F.3d 1044 (D.C. Cir. 1997); *Implementation of the Telecommunications Act of 1996; Accounting Safeguards Under the Telecommunications Act of 1996*, Report and Order, 11 FCC Rcd 17539 (1996).

11 47 U.S.C. § 271(d)(3)(C).

12 *Id*. § 271(d)(3); *see SBC Communications, Inc. v. FCC*, 138 F.3d at 416.

as developed in the FCC's local competition rules and orders in effect at the time the application was filed. Despite the comprehensiveness of these rules, there will inevitably be, in any section 271 proceeding, disputes over an incumbent LEC's precise obligations to its competitors that FCC rules have not addressed and that do not involve *per se* violations of self-executing requirements of the Act. As explained in prior orders, the section 271 process simply could not function as Congress intended if the Commission were required to resolve all such disputes as a precondition to granting a section 271 application.[13] In the context of section 271's adjudicatory framework, the Commission has established certain procedural rules governing BOC section 271 applications.[14] The Commission has explained in prior orders the procedural rules it has developed to facilitate the review process.[15] Here we describe how the Commission considers the evidence of compliance that the BOC presents in its application.

5. As part of the determination that a BOC has satisfied the requirements of section 271, the Commission considers whether the BOC has fully implemented the competitive checklist in subsection (c)(2)(B). The BOC at all times bears the burden of proof of compliance with section 271, even if no party challenges its compliance with a particular requirement.[16] In demonstrating its compliance, a BOC must show that it has a concrete and specific legal obligation to furnish the item upon request pursuant to state-approved interconnection agreements that set forth prices and other terms and conditions for each checklist item, and that it is currently furnishing, or is ready to furnish, the checklist items in quantities that competitors may reasonably demand and at an acceptable level of quality.[17] In particular, the BOC must demonstrate that it is offering interconnection and access to network elements on a nondiscriminatory basis.[18] Previous Commission orders addressing section 271 applications

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[13] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6246, para. 19; *see also American Tel. & Tel. Co. v. FCC*, 220 F.3d 607, 631 (D.C. Cir. 2000).

[14] *See Procedures for Bell Operating Company Applications Under New Section 271 of the Communications Act*, Public Notice, 11 FCC Rcd 19708, 19711 (1996); *Revised Comment Schedule For Ameritech Michigan Application, as amended, for Authorization Under Section 271 of the Communications Act to Provide In-Region, InterLATA Services in the State of Michigan*, Public Notice, DA 97-127 (rel. Jan. 17, 1997); *Revised Procedures for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, 13 FCC Rcd 17457 (1997); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 99-1994 (rel. Sept. 28, 1999); *Updated Filing Requirements for Bell Operating Company Applications Under Section 271 of the Communications Act*, Public Notice, DA 01-734 (CCB rel. Mar. 23, 2001) (collectively "271 Procedural Public Notices").

[15] *See, e.g.*, *SWBT Kansas/Oklahoma Order* 16 FCC Rcd at 6247-50, paras. 21-27; *SWBT Texas Order*, 15 FCC Rcd at 18370-73, paras. 34-42; *Bell Atlantic New York Order*, 15 FCC Rcd at 3968-71, paras. 32-42.

[16] *See SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

[17] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3973-74, para. 52.

[18] *See* 47 U.S.C. § 271(c)(2)(B)(i), (ii).

have elaborated on this statutory standard.[19] First, for those functions the BOC provides to competing carriers that are analogous to the functions a BOC provides to itself in connection with its own retail service offerings, the BOC must provide access to competing carriers in "substantially the same time and manner" as it provides to itself.[20] Thus, where a retail analogue exists, a BOC must provide access that is equal to (i.e., substantially the same as) the level of access that the BOC provides itself, its customers, or its affiliates, in terms of quality, accuracy, and timeliness.[21] For those functions that have no retail analogue, the BOC must demonstrate that the access it provides to competing carriers would offer an efficient carrier a "meaningful opportunity to compete."[22]

6. The determination of whether the statutory standard is met is ultimately a judgment the Commission must make based on its expertise in promoting competition in local markets and in telecommunications regulation generally.[23] The Commission has not established, nor does it believe it appropriate to establish, specific objective criteria for what constitutes "substantially the same time and manner" or a "meaningful opportunity to compete."[24] Whether this legal standard is met can only be decided based on an analysis of specific facts and circumstances. Therefore, the Commission looks at each application on a case-by-case basis and considers the totality of the circumstances, including the origin and quality of the information in the record, to determine whether the nondiscrimination requirements of the Act are met.

A. Performance Data

7. As established in prior section 271 orders, the Commission has found that performance measurements provide valuable evidence regarding a BOC's compliance or noncompliance with individual checklist items. The Commission expects that, in its *prima facie* case in the initial application, a BOC relying on performance data will:

a) provide sufficient performance data to support its contention that the statutory requirements are satisfied;

b) identify the facial disparities between the applicant's performance for itself and its performance for competitors;

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[19] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6250-51, paras. 28-29; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971-72, paras. 44-46.

[20] *SWBT Texas Order*, 15 FCC Rcd at 18373, para. 44; *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44.

[21] *Bell Atlantic New York Order*, 15 FCC Rcd at 3971, para. 44; *Ameritech Michigan Order*, 12 FCC Rcd at 20618-19.

[22] *Id.*

[23] *SWBT Texas Order*, 15 FCC Rcd at 18374, para. 46; *Bell Atlantic New York Order*, 15 FCC Rcd at 3972, para. 46.

[24] *Id.*

c) explain why those facial disparities are anomalous, caused by forces beyond the applicant's control (e.g., competing carrier-caused errors), or have no meaningful adverse impact on a competing carrier's ability to obtain and serve customers; and

d) provide the underlying data, analysis, and methodologies necessary to enable the Commission and commenters meaningfully to evaluate and contest the validity of the applicant's explanations for performance disparities, including, for example, carrier specific carrier-to-carrier performance data.

8. The Commission has explained in prior orders that parity and benchmark standards established by state commissions do not represent absolute maximum or minimum levels of performance necessary to satisfy the competitive checklist. Rather, where these standards are developed through open proceedings with input from both the incumbent and competing carriers, these standards can represent informed and reliable attempts to objectively approximate whether competing carriers are being served by the incumbent in substantially the same time and manner, or in a way that provides them a meaningful opportunity to compete.[25] Thus, to the extent there is no statistically significant difference between a BOC's provision of service to competing carriers and its own retail customers, the Commission generally need not look any further. Likewise, if a BOC's provision of service to competing carriers satisfies the performance benchmark, the analysis is usually done. Otherwise, the Commission will examine the evidence further to make a determination whether the statutory nondiscrimination requirements are met.[26] Thus, the Commission will examine the explanations that a BOC and others provide about whether these data accurately depict the quality of the BOC's performance. The Commission also may examine how many months a variation in performance has existed and what the recent trend has been. The Commission may find that statistically significant differences exist, but conclude that such differences have little or no competitive significance in the marketplace. In such cases, the Commission may conclude that the differences are not meaningful in terms of statutory compliance. Ultimately, the determination of whether a BOC's performance meets the statutory requirements necessarily is a contextual decision based on the totality of the circumstances and information before the Commission.

9. Where there are multiple performance measures associated with a particular checklist item, the Commission would consider the performance demonstrated by all the measurements as a whole. Accordingly, a disparity in performance for one measure, by itself, may not provide a basis for finding noncompliance with the checklist. The Commission may also find that the reported performance data are affected by factors beyond a BOC's control, a finding that would make it less likely to hold the BOC wholly accountable for the disparity. This is not to say, however, that performance discrepancies on a single performance metric are unimportant. Indeed, under certain circumstances, disparity with respect to one performance measurement may support a finding of statutory noncompliance, particularly if the disparity is

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[25] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6252, para. 31; *SWBT Texas Order*, 15 FCC Rcd at 18377, para. 55 & n.102.

[26] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3970, para. 59.

substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.

10. In sum, the Commission does not use performance measurements as a substitute for the 14-point competitive checklist. Rather, it uses performance measurements as valuable evidence with which to inform the judgment as to whether a BOC has complied with the checklist requirements. Although performance measurements add necessary objectivity and predictability to the review, they cannot wholly replace the Commission's own judgment as to whether a BOC has complied with the competitive checklist.

B. Relevance of Previous Section 271 Approvals

11. In some section 271 applications, the volumes of the BOC's commercial orders may be significantly lower than they were in prior proceedings. In certain instances, volumes may be so low as to render the performance data inconsistent and inconclusive.[27] Performance data based on low volumes of orders or other transactions are not as reliable an indicator of checklist compliance as performance based on larger numbers of observations. Indeed, where performance data are based on a low number of observations, small variations in performance may produce wide swings in the reported performance data. It is thus not possible to place the same evidentiary weight upon – and to draw the same types of conclusions from – performance data where volumes are low, as for data based on more robust activity.

12. In such cases, findings in prior, related section 271 proceedings may be a relevant factor in the Commission's analysis. Where a BOC provides evidence that a particular system reviewed and approved in a prior section 271 proceeding is also used in the proceeding at hand, the Commission's review of the same system in the current proceeding will be informed by the findings in the prior one. Indeed, to the extent that issues have already been briefed, reviewed and resolved in a prior section 271 proceeding, and absent new evidence or changed circumstances, an application for a related state should not be a forum for re-litigating and reconsidering those issues. Appropriately employed, such a practice can give us a fuller picture of the BOC's compliance with the section 271 requirements while avoiding, for all parties involved in the section 271 process, the delay and expense associated with redundant and unnecessary proceedings and submissions.

13. However, the statute requires the Commission to make a separate determination of checklist compliance for each state and, accordingly, we do not consider any finding from previous section 271 orders to be dispositive of checklist compliance in current proceedings. While the Commission's review may be informed by prior findings, the Commission will

[27] The Commission has never required, however, an applicant to demonstrate that it processes and provisions a substantial commercial volume of orders, or has achieved a specific market share in its service area, as a prerequisite for satisfying the competitive checklist. *See Ameritech Michigan Order*, 12 FCC Rcd at 20585, para. 77 (explaining that Congress had considered and rejected language that would have imposed a "market share" requirement in section 271(c)(1)(A)).

consider all relevant evidence in the record, including state-specific factors identified by commenting parties, the states, the Department of Justice. However, the Commission has always held that an applicant's performance towards competing carriers in an actual commercial environment is the best evidence of nondiscriminatory access to OSS and other network elements.[28] Thus, the BOC's actual performance in the applicant state may be relevant to the analysis and determinations with respect to the 14 checklist items. Evidence of satisfactory performance in another state cannot trump convincing evidence that an applicant fails to provide nondiscriminatory access to a network element in the applicant state.

14. Moreover, because the Commission's review of a section 271 application must be based on a snapshot of a BOC's recent performance at the time an application is filed, the Commission cannot simply rely on findings relating to an applicant's performance in an anchor state at the time it issued the determination for that state. The performance in that state could change due to a multitude of factors, such as increased order volumes or shifts in the mix of the types of services or UNEs requested by competing carriers. Thus, even when the applicant makes a convincing showing of the relevance of anchor state data, the Commission must examine how recent performance in that state compares to performance at the time it approved that state's section 271 application, in order to determine if the systems and processes continue to perform at acceptable levels.

III. COMPLIANCE WITH ENTRY REQUIREMENTS — SECTIONS 271(c)(1)(A) & 271(c)(1)(B)

15. As noted above, in order for the Commission to approve a BOC's application to provide in-region, interLATA services, a BOC must first demonstrate that it satisfies the requirements of either section 271(c)(1)(A) (Track A) or 271(c)(1)(B) (Track B).[29] To qualify for Track A, a BOC must have interconnection agreements with one or more competing providers of "telephone exchange service . . . to residential and business subscribers."[30] The Act states that "such telephone service may be offered . . . either exclusively over [the competitor's] own telephone exchange service facilities or predominantly over [the competitor's] own telephone exchange facilities in combination with the resale of the telecommunications services of another carrier."[31] The Commission concluded in the *Ameritech Michigan Order* that section 271(c)(1)(A) is satisfied if one or more competing providers collectively serve residential and business subscribers.[32]

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[28] *See SWBT Texas Order*, 15 FCC Rcd at 18376, para. 53; *Bell Atlantic New York Order*, 15 FCC Rcd at 3974, para. 53.

[29] *See* 47 U.S.C. § 271(d)(3)(A).

[30] *Id*.

[31] *Id*.

[32] *See Ameritech Michigan Order*, 12 FCC Rcd at 20589, para. 85; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20633-35, paras. 46-48.

16. As an alternative to Track A, Section 271(c)(1)(B) permits BOCs to obtain authority to provide in-region, interLATA services if, after 10 months from the date of enactment, no facilities-based provider, as described in subparagraph (A), has requested the access and interconnection arrangements described therein (referencing one or more binding agreements approved under Section 252), but the state has approved an SGAT that satisfies the competitive checklist of subsection (c)(2)(B). Under section 271(d)(3)(A)(ii), the Commission shall not approve such a request for in-region, interLATA service unless the BOC demonstrates that, "with respect to access and interconnection generally offered pursuant to [an SGAT], such statement offers all of the items included in the competitive checklist."[33] Track B, however, is not available to a BOC if it has already received a request for access and interconnection from a prospective competing provider of telephone exchange service.[34]

IV. COMPLIANCE WITH THE COMPETITIVE CHECKLIST – SECTION 271(C)(2)(B)

A. Checklist Item 1– Interconnection

17. Section 271(c)(2)(B)(i) of the Act requires a section 271 applicant to provide "[i]nterconnection in accordance with the requirements of sections 251(c)(2) and 252(d)(1)."[35] Section 251(c)(2) imposes a duty on incumbent LECs "to provide, for the facilities and equipment of any requesting telecommunications carrier, interconnection with the local exchange carrier's network . . . for the transmission and routing of telephone exchange service and exchange access."[36] In the *Local Competition First Report and Order*, the Commission concluded that interconnection referred "only to the physical linking of two networks for the mutual exchange of traffic."[37] Section 251 contains three requirements for the provision of interconnection. First, an incumbent LEC must provide interconnection "at any technically feasible point within the carrier's network."[38] Second, an incumbent LEC must provide interconnection that is "at least equal in quality to that provided by the local exchange carrier to

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[33] 47 U.S.C. § 271(d)(3)(A)(ii).

[34] *See Ameritech Michigan Order*, 12 FCC Rcd at 20561-62, para. 34. Nevertheless, the above-mentioned foreclosure of Track B as an option is subject to limited exceptions. *See* 47 U.S.C. § 271(c)(1)(B); *see also Ameritech Michigan Order*, 12 FCC Rcd at 20563-64, paras. 37-38.

[35] 47 U.S.C. § 271(c)(2)(B)(i); *see Bell Atlantic New York Order*, 15 FCC Rcd at 3977-78, para. 63; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640, para. 61; *Ameritech Michigan Order*, 12 FCC Rcd at 20662, para. 222.

[36] 47 U.S.C. § 251(c)(2)(A).

[37] *Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, First Report and Order, 11 FCC Rcd 15499, 15590, para. 176 (1996) (*Local Competition First Report and Order*). Transport and termination of traffic are therefore excluded from the Commission's definition of interconnection. *See id.*

[38] 47 U.S.C. § 251(c)(2)(B). In the *Local Competition First Report and Order*, the Commission identified a minimum set of technically feasible points of interconnection. *See Local Competition First Report and Order*, 11 FCC Rcd at 15607-09, paras. 204-11.

itself."[39] Finally, the incumbent LEC must provide interconnection "on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms of the agreement and the requirements of [section 251] and section 252."[40]

18. To implement the equal-in-quality requirement in section 251, the Commission's rules require an incumbent LEC to design and operate its interconnection facilities to meet "the same technical criteria and service standards" that are used for the interoffice trunks within the incumbent LEC's network.[41] In the *Local Competition First Report and Order*, the Commission identified trunk group blockage and transmission standards as indicators of an incumbent LEC's technical criteria and service standards.[42] In prior section 271 applications, the Commission concluded that disparities in trunk group blockage indicated a failure to provide interconnection to competing carriers equal-in-quality to the interconnection the BOC provided to its own retail operations.[43]

19. In the *Local Competition First Report and Order*, the Commission concluded that the requirement to provide interconnection on terms and conditions that are "just, reasonable, and nondiscriminatory" means that an incumbent LEC must provide interconnection to a competitor in a manner no less efficient than the way in which the incumbent LEC provides the comparable function to its own retail operations.[44] The Commission's rules interpret this obligation to include, among other things, the incumbent LEC's installation time for interconnection service[45] and its provisioning of two-way trunking arrangements.[46] Similarly, repair time for troubles affecting interconnection trunks is useful for determining whether a BOC

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[39] 47 U.S.C. § 251(c)(2)(C).

[40] *Id*. § 251(c)(2)(D).

[41] *Local Competition First Report and Order*, 11 FCC Rcd at 15613-15, paras. 221-225; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20641-42, paras. 63-64.

[42] *Local Competition First Report and Order*, 11 FCC Rcd at 15614-15, paras. 224-25.

[43] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3978, para. 64; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20648-50, paras. 74-77; *Ameritech Michigan Order*, 12 FCC Rcd at 20671-74, paras. 240-45. The Commission has relied on trunk blockage data to evaluate a BOC's interconnection performance. Trunk group blockage indicates that end users are experiencing difficulty completing or receiving calls, which may have a direct impact on the customer's perception of a competitive LEC's service quality.

[44] *Local Competition First Report and Order*, 11 FCC Rcd at 15612, para. 218; *see also Bell Atlantic New York* Order, 15 FCC Rcd at 3978, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65.

[45] 47 C.F.R. § 51.305(a)(5).

[46] The Commission's rules require an incumbent LEC to provide two-way trunking upon request, wherever two-way trunking arrangements are technically feasible. 47 C.F.R. § 51.305(f); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3978-79, para. 65; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20642, para. 65; *Local Competition First Report and Order*, 11 FCC Rcd 15612-13, paras. 219-20.

provides interconnection service under "terms and conditions that are no less favorable than the terms and conditions" the BOC provides to its own retail operations.[47]

20. Competing carriers may choose any method of technically feasible interconnection at a particular point on the incumbent LEC's network.[48] Incumbent LEC provision of interconnection trunking is one common means of interconnection. Technically feasible methods also include, but are not limited to, physical and virtual collocation and meet point arrangements.[49] The provision of collocation is an essential prerequisite to demonstrating compliance with item 1 of the competitive checklist.[50] In the *Advanced Services First Report and Order*, the Commission revised its collocation rules to require incumbent LECs to include shared cage and cageless collocation arrangements as part of their physical collocation offerings.[51] In response to a remand from the D.C. Circuit, the Commission adopted the *Collocation Remand Order*, establishing revised criteria for equipment for which incumbent LECs must permit collocation, requiring incumbent LECs to provide cross-connects between collocated carriers, and establishing principles for physical collocation space and configuration.[52] To show compliance with its collocation obligations, a BOC must have processes and procedures in place to ensure that all applicable collocation arrangements are available on terms and conditions that are "just, reasonable, and nondiscriminatory" in accordance with section 251(c)(6) and the FCC's implementing rules.[53] Data showing the quality of procedures for processing applications for collocation space, as well as the timeliness and efficiency of provisioning collocation space, help the Commission evaluate a BOC's compliance with its collocation obligations.[54]

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[47] 47 C.F.R. § 51.305(a)(5).

[48] *Local Competition First Report and Order*, 11 FCC Rcd at 15779, paras. 549-50; *see Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 61.

[49] 47 C.F.R. § 51.321(b); *Local Competition First Report and Order*, 11 FCC Rcd at 15779-82, paras. 549-50; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, para. 62.

[50] 47 U.S.C. § 251(c)(6) (requiring incumbent LECs to provide physical collocation); *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

[51] *Deployment of Wireline Services offering Advanced Telecommunications Capability*, First Report and Order and Further Notice of Proposed Rulemaking, 14 FCC Rcd 4761, 4784-86, paras. 41-43 (1999), *aff'd in part and vacated and remanded in part sub nom. GTE Service Corp. v. FCC*, 205 F.3d 416 (D.C. Cir. 2000), *on recon.*, *Collocation Reconsideration Order*, 15 FCC Rcd 17806 (2000); *on remand*, *Deployment of Wireline Services Offering Advanced Telecommunications Capability*, Fourth Report and Order, 16 FCC Rcd 15435 (2001) (*Collocation Remand Order*), *petition for recon. pending*.

[52] *See Collocation Remand Order*, 16 FCC Rcd at 15441-42, para. 12.

[53] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20643, para. 66; *BellSouth Carolina Order*, 13 FCC Rcd at 649-51, para. 62.

[54] *Bell Atlantic New York Order*, 15 FCC Rcd at 3979, para. 66; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20640-41, paras. 61-62.

21. As stated above, checklist item 1 requires a BOC to provide "interconnection in accordance with the requirements of sections 251(c)(2) *and* 252(d)(1)."[55] Section 252(d)(1) requires state determinations regarding the rates, terms, and conditions of interconnection to be based on cost and to be nondiscriminatory, and allows the rates to include a reasonable profit.[56] The Commission's pricing rules require, among other things, that in order to comply with its collocation obligations, an incumbent LEC provide collocation based on TELRIC.[57]

22. To the extent pricing disputes arise, the Commission will not duplicate the work of the state commissions. As noted in the *SWBT Texas Order*, the Act authorizes the state commissions to resolve specific carrier-to-carrier disputes arising under the local competition provisions, and it authorizes the federal district courts to ensure that the results of the state arbitration process are consistent with federal law.[58] Although the Commission has an independent statutory obligation to ensure compliance with the checklist, section 271 does not compel us to preempt the orderly disposition of intercarrier disputes by the state commissions, particularly now that the Supreme Court has restored the Commission's pricing jurisdiction and has thereby directed the state commissions to follow FCC pricing rules in their disposition of those disputes.[59]

23. Consistent with the Commission's precedent, the mere presence of interim rates will not generally threaten a section 271 application so long as: (1) an interim solution to a particular rate dispute is reasonable under the circumstances; (2) the state commission has demonstrated its commitment to the Commission's pricing rules; and (3) provision is made for refunds or true-ups once permanent rates are set.[60] In addition, the Commission has determined that rates contained within an approved section 271 application, including those that are interim, are reasonable starting points for interim rates for the same carrier in an adjoining state.[61]

24. Although the Commission has been willing to grant a section 271 application with a limited number of interim rates where the above-mentioned three-part test is met, it is clearly preferable to analyze a section 271 application on the basis of rates derived from a permanent rate proceeding.[62] At some point, states will have had sufficient time to complete these

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[55] 47 U.S.C. § 271(c)(2)(B)(i) (emphasis added).

[56] *Id*. § 252(d)(1).

[57] *See* 47 C.F.R. §§ 51.501-07, 51.509(g); *Local Competition First Report and Order*, 11 FCC Rcd at 15812-16, 15844-61, 15874-76, 15912, paras. 618-29, 674-712, 743-51, 826.

[58] *See SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88; *see also* 47 U.S.C. §§ 252(c), (e)(6); *American Tel. & Tel Co. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999) (*AT&T v. Iowa Utils. Bd*.).

[59] *SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88; *AT&T Corp. v. Iowa Utils. Bd*., 525 U.S. at 377-86.

[60] *SWBT Texas Order*, 15 FCC Rcd at 18394, para. 88; *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 258 (explaining the Commission's case-by-case review of interim prices).

[61] *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6359-60, para. 239.

[62] *See Bell Atlantic New York Order*, 15 FCC Rcd at 4091, para. 260.

proceedings. The Commission will, therefore, become more reluctant to continue approving section 271 applications containing interim rates. It would not be sound policy for interim rates to become a substitute for completing these significant proceedings.

B. Checklist Item 2 – Unbundled Network Elements

1. Access to Operations Support Systems

25. Incumbent LECs use a variety of systems, databases, and personnel (collectively referred to as OSS) to provide service to their customers.[63] The Commission consistently has found that nondiscriminatory access to OSS is a prerequisite to the development of meaningful local competition.[64] For example, new entrants must have access to the functions performed by the incumbent's OSS in order to formulate and place orders for network elements or resale services, to install service to their customers, to maintain and repair network facilities, and to bill customers.[65] The Commission has determined that without nondiscriminatory access to the BOC's OSS, a competing carrier "will be severely disadvantaged, if not precluded altogether, from fairly competing" in the local exchange market.[66]

26. Section 271 requires the Commission to determine whether a BOC offers nondiscriminatory access to OSS functions. Section 271(c)(2)(B)(ii) requires a BOC to provide "nondiscriminatory access to network elements in accordance with the requirements of sections 251(c)(3) and 252(d)(1)."[67] The Commission has determined that access to OSS functions falls squarely within an incumbent LEC's duty under section 251(c)(3) to provide unbundled network elements (UNEs) under terms and conditions that are nondiscriminatory and just and reasonable, and its duty under section 251(c)(4) to offer resale services without imposing any limitations or conditions that are discriminatory or unreasonable.[68] The Commission must therefore examine a BOC's OSS performance to evaluate compliance with section 271(c)(2)(B)(ii) and (xiv).[69] In addition, the Commission has also concluded that the duty to provide nondiscriminatory access to OSS functions is embodied in other terms of the competitive checklist as well.[70] Consistent

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63 *Id*. at 3989-90, para. 83; *BellSouth South Carolina Order*, 13 FCC Rcd at 585.

64 *See Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 83; *BellSouth South Carolina Order*, 13 FCC Rcd at 547-48, 585; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20653.

65 *See Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 83.

66 *Id.*

67 47 U.S.C. § 271(c)(2)(B)(ii).

68 *Bell Atlantic New York Order*, 15 FCC Rcd at 3990, para. 84.

69 *Id.*

70 *Id.* As part of a BOC's demonstration that it is "providing" a checklist item (*e.g.*, unbundled loops, unbundled local switching, resale services), it must demonstrate that it is providing nondiscriminatory access to the systems, information, and personnel that support that element or service. An examination of a BOC's OSS performance is (continued….)

with prior orders, the Commission examines a BOC's OSS performance directly under checklist items 2 and 14, as well as other checklist terms.[71]

27. As part of its statutory obligation to provide nondiscriminatory access to OSS functions, a BOC must provide access that sufficiently supports each of the three modes of competitive entry envisioned by the 1996 Act – competitor-owned facilities, UNEs, and resale.[72] For OSS functions that are analogous to those that a BOC provides to itself, its customers or its affiliates, the nondiscrimination standard requires the BOC to offer requesting carriers access that is equivalent in terms of quality, accuracy, and timeliness.[73] The BOC must provide access that permits competing carriers to perform these functions in "substantially the same time and manner" as the BOC.[74] The Commission has recognized in prior orders that there may be situations in which a BOC contends that, although equivalent access has not been achieved for an analogous function, the access that it provides is nonetheless nondiscriminatory within the meaning of the statute.[75]

28. For OSS functions that have no retail analogue, the BOC must offer access "sufficient to allow an efficient competitor a meaningful opportunity to compete."[76] In assessing whether the quality of access affords an efficient competitor a meaningful opportunity to compete, the Commission will examine, in the first instance, whether specific performance standards exist for those functions.[77] In particular, the Commission will consider whether appropriate standards for measuring OSS performance have been adopted by the relevant state commission or agreed upon by the BOC in an interconnection agreement or during the implementation of such an agreement.[78] If such performance standards exist, the Commission

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therefore integral to the determination of whether a BOC is offering all of the items contained in the competitive checklist. *Id*.

71 *Id.* at 3990-91, para. 84.

72 *Id.* at 3991, para. 85.

73 *Id.*

74 *Id.* For example, the Commission would not deem an incumbent LEC to be providing nondiscriminatory access to OSS if limitations on the processing of information between the interface and the back office systems prevented a competitor from performing a specific function in substantially the same time and manner as the incumbent performs that function for itself.

75 *See id.*

76 *Id.* at 3991, para. 86.

77 *Id.*

78 *Id.* As a general proposition, specific performance standards adopted by a state commission in an arbitration decision would be more persuasive evidence of commercial reasonableness than a standard unilaterally adopted by the BOC outside of its interconnection agreement. *Id*. at 20619-20.

will evaluate whether the BOC's performance is sufficient to allow an efficient competitor a meaningful opportunity to compete.[79]

29. The Commission analyzes whether a BOC has met the nondiscrimination standard for each OSS function using a two-step approach. First, the Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[80] The Commission next assesses "whether the OSS functions that the BOC has deployed are operationally ready, as a practical matter."[81]

30. Under the first inquiry, a BOC must demonstrate that it has developed sufficient electronic (for functions that the BOC accesses electronically) and manual interfaces to allow competing carriers equivalent access to all of the necessary OSS functions.[82] For example, a BOC must provide competing carriers with the specifications necessary for carriers to design or modify their systems in a manner that will enable them to communicate with the BOC's systems and any relevant interfaces.[83] In addition, a BOC must disclose to competing carriers any internal business rules[84] and other formatting information necessary to ensure that a carrier's requests and orders are processed efficiently.[85] Finally, a BOC must demonstrate that its OSS is designed to accommodate both current demand and projected demand for competing carriers'

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[79] *See id.* at 3991-92, para. 86.

[80] *Id.* at 3992, para. 87; *Ameritech Michigan Order*, 12 FCC Rcd at 20616; s*ee also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20654; *BellSouth South Carolina Order*, 13 FCC Rcd at 592-93. In making this determination, the Commission "consider[s] all of the automated and manual processes a BOC has undertaken to provide access to OSS functions," including the interface (or gateway) that connects the competing carrier's own operations support systems to the BOC; any electronic or manual processing link between that interface and the BOC's OSS (including all necessary back office systems and personnel); and all of the OSS that a BOC uses in providing network elements and resale services to a competing carrier. *Ameritech Michigan Order*, 12 FCC Rcd at 20615; s*ee also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20654 n.241.

[81] *See Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.

[82] *Id*. at 3992, para. 87; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20616, para. 136 (The Commission determines "whether the BOC has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and whether the BOC is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."). For example, a BOC must provide competing carriers the specifications necessary to design their systems interfaces and business rules necessary to format orders, and demonstrate that systems are scalable to handle current and projected demand. *Id.*

[83] *Id.*

[84] Business rules refer to the protocols that a BOC uses to ensure uniformity in the format of orders and include information concerning ordering codes such as universal service ordering codes (USOCs) and field identifiers (FIDs). *Id.*; *see also Ameritech Michigan Order*, 12 FCC Rcd at 20617 n.335.

[85] *Bell Atlantic New York Order*, 15 FCC Rcd at 3992, para. 88.

access to OSS functions.[86] Although not a prerequisite, the Commission continues to encourage the use of industry standards as an appropriate means of meeting the needs of a competitive local exchange market.[87]

31. Under the second inquiry, the Commission examines performance measurements and other evidence of commercial readiness to ascertain whether the BOC's OSS is handling current demand and will be able to handle reasonably foreseeable future volumes.[88] The most probative evidence that OSS functions are operationally ready is actual commercial usage.[89] Absent sufficient and reliable data on commercial usage, the Commission will consider the results of carrier-to-carrier testing, independent third-party testing, and internal testing in assessing the commercial readiness of a BOC's OSS.[90] Although the Commission does not require OSS testing, a persuasive test will provide us with an objective means by which to evaluate a BOC's OSS readiness where there is little to no evidence of commercial usage, or may otherwise strengthen an application where the BOC's evidence of actual commercial usage is weak or is otherwise challenged by competitors. The persuasiveness of a third-party review, however, is dependent upon the qualifications, experience and independence of the third party and the conditions and scope of the review itself.[91] If the review is limited in scope or depth or is not independent and blind, the Commission will give it minimal weight. As noted above, to the extent the Commission reviews performance data, it looks at the totality of the circumstances and generally does not view individual performance disparities, particularly if they are isolated and slight, as dispositive of whether a BOC has satisfied its checklist obligations.[92] Individual performance disparities may, nevertheless, result in a finding of checklist noncompliance, particularly if the disparity is substantial or has endured for a long time, or if it is accompanied by other evidence of discriminatory conduct or evidence that competing carriers have been denied a meaningful opportunity to compete.

a. Relevance of a BOC's Prior Section 271 Orders

32. The *SWBT Kansas/Oklahoma Order* specifically outlined a non-exhaustive evidentiary showing that must be made in the initial application when a BOC seeks to rely on evidence presented in another application.[93] First, a BOC's application must explain the extent

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86 *Id.*

87 *See id.*

88 *Id.* at 3993, para. 89.

89 *Id.*

90 *Id.*

91 *See id.*; *Ameritech Michigan Order*, 12 FCC Rcd at 20659 (emphasizing that a third-party review should encompass the entire obligation of the incumbent LEC to provide nondiscriminatory access, and, where applicable, should consider the ability of actual competing carriers in the market to operate using the incumbent's OSS access).

92 *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6301-02, para. 138.

93 *See id.* at 6286-91, paras. 107-18

to which the OSS are "the same" – that is, whether it employs the shared use of a single OSS, or the use of systems that are identical, but separate.[94] To satisfy this inquiry, the Commission looks to whether the relevant states utilize a common set of processes, business rules, interfaces, systems and, in many instances, even personnel.[95] The Commission will also carefully examine third party reports that demonstrate that the BOC's OSS are the same in each of the relevant states.[96] Finally, where a BOC has discernibly separate OSS, it must demonstrate that its OSS reasonably can be expected to behave in the same manner.[97] Second, unless an applicant seeks to establish only that certain discrete components of its OSS are the same, an applicant must submit evidence relating to *all* aspects of its OSS, including those OSS functions performed by BOC personnel.

b. Pre-Ordering

33. A BOC must demonstrate that: (i) it offers nondiscriminatory access to OSS pre-ordering functions associated with determining whether a loop is capable of supporting xDSL advanced technologies; (ii) competing carriers successfully have built and are using application-to-application interfaces to perform pre-ordering functions and are able to integrate pre-ordering and ordering interfaces; [98] and (iii) its pre-ordering systems provide reasonably prompt response times and are consistently available in a manner that affords competitors a meaningful opportunity to compete.[99]

34. The pre-ordering phase of OSS generally includes those activities that a carrier undertakes to gather and verify the information necessary to place an order.[100] Given that pre-

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94 *See id*. at 6288, para. 111.

95 The Commission has consistently held that a BOC's OSS includes both mechanized systems and manual processes, and thus the OSS functions performed by BOC personnel have been part of the FCC's OSS functionality and commercial readiness reviews.

96 *See SWBT Kansas/Oklahoma Order*, *id*. at 6287, para. 108.

97 *See id*. at 6288, para. 111.

98 In prior orders, the Commission has emphasized that providing pre-ordering functionality through an application-to-application interface is essential in enabling carriers to conduct real-time processing and to integrate pre-ordering and ordering functions in the same manner as the BOC. *SWBT Texas Order*, 15 FCC Rcd at 18426, para. 148.

99 The Commission has held previously that an interface that provides responses in a prompt timeframe and is stable and reliable, is necessary for competing carriers to market their services and serve their customers as efficiently and at the same level of quality as a BOC serves its own customers. *See Bell Atlantic New York Order*, 15 FCC Rcd at 4025 and 4029, paras. 145 and 154.

100 *See Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20660, para. 94 (referring to "pre-ordering and ordering" collectively as "the exchange of information between telecommunications carriers about current or proposed customer products and services or unbundled network elements or some combination thereof"). In prior orders, the Commission has identified the following five pre-order functions: (1) customer service record (CSR) information; (2) address validation; (3) telephone number information; (4) due date information; (5) services and feature information. *See Bell Atlantic* (continued….)

ordering represents the first exposure that a prospective customer has to a competing carrier, it is critical that a competing carrier is able to accomplish pre-ordering activities in a manner no less efficient and responsive than the incumbent.[101] Most of the pre-ordering activities that must be undertaken by a competing carrier to order resale services and UNEs from the incumbent are analogous to the activities a BOC must accomplish to furnish service to its own customers. For these pre-ordering functions, a BOC must demonstrate that it provides requesting carriers access that enables them to perform pre-ordering functions in substantially the same time and manner as its retail operations.[102] For those pre-ordering functions that lack a retail analogue, a BOC must provide access that affords an efficient competitor a meaningful opportunity to compete.[103] In prior orders, the Commission has emphasized that providing pre-ordering functionality through an application-to-application interface is essential in enabling carriers to conduct real-time processing and to integrate pre-ordering and ordering functions in the same manner as the BOC.[104]

(i) Access to Loop Qualification Information

35. In accordance with the *UNE Remand Order*,[105] the Commission requires incumbent carriers to provide competitors with access to all of the same detailed information about the loop that is available to the incumbents,[106] and in the same time frame, so that a competing carrier can make an independent judgment at the pre-ordering stage about whether an end user loop is capable of supporting the advanced services equipment the competing carrier intends to install.[107] Under the *UNE Remand Order*, the relevant inquiry is not whether a BOC's

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New York Order, 15 FCC Rcd at 4015, para. 132; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20660, para. 94; *BellSouth South Carolina Order*, 13 FCC Rcd at 619, para. 147.

[101] *Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129.

[102] *Id.*; *see also BellSouth South Carolina Order*, 13 FCC Rcd at 623-29 (concluding that failure to deploy an application-to-application interface denies competing carriers equivalent access to pre-ordering OSS functions).

[103] *Bell Atlantic New York Order*, 15 FCC Rcd at 4014, para. 129.

[104] *See id.* at 4014, para. 130; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20661-67, para. 105.

[105] *UNE Remand Order*, 15 FCC Rcd at 3885, para. 426 (determining "that the pre-ordering function includes access to loop qualification information").

[106] *See id.* At a minimum, a BOC must provide (1) the composition of the loop material, including both fiber and copper; (2) the existence, location and type of any electronic or other equipment on the loop, including but not limited to, digital loop carrier or other remote concentration devices, feeder/distribution interfaces, bridge taps, load coils, pair-gain devices, disturbers in the same or adjacent binder groups; (3) the loop length, including the length and location of each type of transmission media; (4) the wire gauge(s) of the loop; and (5) the electrical parameters of the loop, which may determine the suitability of the loop for various technologies. *Id.*

[107] As the Commission has explained in prior proceedings, because characteristics of a loop, such as its length and the presence of various impediments to digital transmission, can hinder certain advanced services technologies, carriers often seek to "pre-qualify" a loop by accessing basic loop makeup information that will assist carriers in ascertaining whether the loop, either with or without the removal of the impediments, can support a particular advanced service. *See id.*, 15 FCC Rcd at 4021, para. 140.

retail arm accesses such underlying information but whether such information exists anywhere in a BOC's back office and can be accessed by any of a BOC's personnel.[108] Moreover, a BOC may not "filter or digest" the underlying information and may not provide only information that is useful in provisioning of a particular type of xDSL that a BOC offers.[109] A BOC must also provide loop qualification information based, for example, on an individual address or zip code of the end users in a particular wire center, NXX code or on any other basis that the BOC provides such information to itself. Moreover, a BOC must also provide access for competing carriers to the loop qualifying information that the BOC can itself access manually or electronically. Finally, a BOC must provide access to loop qualification information to competitors within the same time intervals it is provided to the BOC's retail operations or its advanced services affiliate.[110] As the Commission determined in the *UNE Remand Order*, however, "to the extent such information is not normally provided to the incumbent's retail personnel, but can be obtained by contacting back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information."[111]

c. Ordering

36. Consistent with section 271(c)(2)(B)(ii), a BOC must demonstrate its ability to provide competing carriers with access to the OSS functions necessary for placing wholesale orders. For those functions of the ordering systems for which there is a retail analogue, a BOC must demonstrate, with performance data and other evidence, that it provides competing carriers with access to its OSS in substantially the same time and manner as it provides to its retail operations. For those ordering functions that lack a direct retail analogue, a BOC must demonstrate that its systems and performance allow an efficient carrier a meaningful opportunity to compete. As in prior section 271 orders, the Commission looks primarily at the applicant's ability to return order confirmation notices, order reject notices, order completion notices and jeopardies, and at its order flow-through rate.[112]

d. Provisioning

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[108] *UNE Remand Order*, 15 FCC Rcd at 3885-3887, paras. 427-431 (noting that "to the extent such information is not normally provided to the incumbent's retail personnel, but can be obtained by contacting back office personnel, it must be provided to requesting carriers within the same time frame that any incumbent personnel are able to obtain such information.").

[109] *See SWBT Kansas Oklahoma Order*, 16 FCC Rcd at 6292-93, para. 121.

[110] *Id.*

[111] *UNE Remand Order*, 15 FCC Rcd at 3885-3887, paras. 427-31.

[112] *See SWBT Texas Order*, 15 FCC Rcd at 18438, para. 170; *Bell Atlantic New York Order*, 15 FCC Rcd at 4035-39, paras. 163-66. The Commission examines (i) order flow-through rates, (ii) jeopardy notices and (iii) order completion notices using the "same time and manner" standard. The Commission examines order confirmation notices and order rejection notices using the "meaningful opportunity to compete" standard.

37. A BOC must provision competing carriers' orders for resale and UNE-P services in substantially the same time and manner as it provisions orders for its own retail customers.[113] Consistent with the approach in prior section 271 orders, the Commission examines a BOC's provisioning processes, as well as its performance with respect to provisioning timeliness (i.e., missed due dates and average installation intervals) and provisioning quality (i.e., service problems experienced at the provisioning stage).[114]

e. Maintenance and Repair

38. A competing carrier that provides service through resale or UNEs remains dependent upon the incumbent LEC for maintenance and repair. Thus, as part of its obligation to provide nondiscriminatory access to OSS functions, a BOC must provide requesting carriers with nondiscriminatory access to its maintenance and repair systems.[115] To the extent a BOC performs analogous maintenance and repair functions for its retail operations, it must provide competing carriers access that enables them to perform maintenance and repair functions "in substantially the same time and manner" as a BOC provides its retail customers.[116] Equivalent access ensures that competing carriers can assist customers experiencing service disruptions using the same network information and diagnostic tools that are available to BOC personnel.[117] Without equivalent access, a competing carrier would be placed at a significant competitive disadvantage, as its customer would perceive a problem with a BOC's network as a problem with the competing carrier's own network.[118]

f. Billing

39. A BOC must provide nondiscriminatory access to its billing functions, which is necessary to enable competing carriers to provide accurate and timely bills to their customers.[119] In making this determination, the Commission assesses a BOC's billing processes and systems, and its performance data. Consistent with prior section 271 orders, a BOC must demonstrate that it provides competing carriers with complete and accurate reports on the service usage of competing carriers' customers in substantially the same time and manner that a BOC provides

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[113] *See Bell Atlantic New York*, 15 FCC Rcd at 4058, para. 196. For provisioning timeliness, the Commission looks to missed due dates and average installation intervals; for provisioning quality, the Commission looks to service problems experienced at the provisioning stage.

[114] *Id.*

[115] *Id*. at 4067, para. 212; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20692; *Ameritech Michigan Order*, 12 FCC Rcd at 20613, 20660-61.

[116] *Bell Atlantic New York Order*, 15 FCC Rcd at 4058, para. 196; *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20692-93.

[117] *Bell Atlantic New York Order*, 15 FCC Rcd at 4058, para. 196.

[118] *Id*.

[119] *See SWBT Texas Order*, 15 FCC Rcd at 18461, para. 210.

such information to itself, and with wholesale bills in a manner that gives competing carriers a meaningful opportunity to compete.[120]

g. Change Management Process

40. Competing carriers need information about, and specifications for, an incumbent's systems and interfaces to develop and modify their systems and procedures to access the incumbent's OSS functions.[121] Thus, in order to demonstrate that it is providing nondiscriminatory access to its OSS, a BOC must first demonstrate that it "has deployed the necessary systems and personnel to provide sufficient access to each of the necessary OSS functions and . . . is adequately assisting competing carriers to understand how to implement and use all of the OSS functions available to them."[122] By showing that it adequately assists competing carriers to use available OSS functions, a BOC provides evidence that it offers an efficient competitor a meaningful opportunity to compete.[123] As part of this demonstration, the Commission will give substantial consideration to the existence of an adequate change management process and evidence that the BOC has adhered to this process over time.[124]

41. The change management process refers to the methods and procedures that the BOC employs to communicate with competing carriers regarding the performance of, and changes in, the BOC's OSS.[125] Such changes may include updates to existing functions that impact competing carrier interface(s) upon a BOC's release of new interface software; technology changes that require competing carriers to meet new technical requirements upon a BOC's software release date; additional functionality changes that may be used at the competing carrier's option, on or after a BOC's release date for new interface software; and changes that may be mandated by regulatory authorities.[126] Without a change management process in place, a BOC can impose substantial costs on competing carriers simply by making changes to its systems and interfaces without providing adequate testing opportunities and accurate and timely notice and documentation of the changes.[127] Change management problems can impair a

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120 *See id.*; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6316-17, at para. 163.

121 *Bell Atlantic New York Order*, 15 FCC Rcd at 3999-4000, para. 102; *First BellSouth Louisiana Order*, 13 FCC Rcd at 6279 n.197; *BellSouth South Carolina Order*, 13 FCC Rcd at 625 n.467; *Ameritech Michigan Order*, 12 FCC Rcd at 20617 n.334; *Local Competition Second Report and Order*, 11 FCC Rcd at 19742.

122 *Bell Atlantic New York Order*, 15 FCC Rcd at 3999, para. 102.

123 *Id.* at 3999-4000, para. 102

124 *Id.* at 4000, para. 102.

125 *Id.* at 4000, para. 103.

126 *Id.*

127 *Id.* at 4000, para. 103.

competing carrier's ability to obtain nondiscriminatory access to UNEs, and hence a BOC's compliance with section 271(2)(B)(ii).[128]

42. In evaluating whether a BOC's change management plan affords an efficient competitor a meaningful opportunity to compete, the Commission first assesses whether the plan is adequate. In making this determination, it assesses whether the evidence demonstrates: (1) that information relating to the change management process is clearly organized and readily accessible to competing carriers;[129] (2) that competing carriers had substantial input in the design and continued operation of the change management process;[130] (3) that the change management plan defines a procedure for the timely resolution of change management disputes;[131] (4) the availability of a stable testing environment that mirrors production;[132] and (5) the efficacy of the documentation the BOC makes available for the purpose of building an electronic gateway.[133] After determining whether the BOC's change management plan is adequate, the Commission evaluates whether the BOC has demonstrated a pattern of compliance with this plan.[134]

2. UNE Combinations

43. In order to comply with the requirements of checklist item 2, a BOC must show that it is offering "[n]ondiscriminatory access to network elements in accordance with the requirements of section 251(c)(3)."[135] Section 251(c)(3) requires an incumbent LEC to "provide, to any requesting telecommunications carrier . . . nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms and conditions that are just, reasonable, and nondiscriminatory."[136] Section 251(c)(3) of the Act also requires incumbent LECs to provide UNEs in a manner that allows requesting carriers to combine such elements in order to provide a telecommunications service.[137]

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[128] *Id.*

[129] *Id.* at 4002, para. 107.

[130] *Id.* at 4000, para. 104.

[131] *Id.* at 4002, para. 108.

[132] *Id.* at 4002-03, paras. 109-10.

[133] *Id.* at 4003-04, para. 110. In the *Bell Atlantic New York Order*, the Commission used these factors in determining whether Bell Atlantic had an adequate change management process in place. *See id.* at 4004, para. 111. The Commission left open the possibility, however, that a change management plan different from the one implemented by Bell Atlantic may be sufficient to demonstrate compliance with the requirements of section 271. *Id.*

[134] *Id.* at 3999, para. 101, 4004-05, para. 112.

[135] 47 U.S.C. § 271(c)(2)(B)(ii).

[136] *Id.* § 251(c)(3).

[137] *Id.*

44. In the *Ameritech Michigan Order*, the Commission emphasized that the ability of requesting carriers to use UNEs, as well as combinations of UNEs, is integral to achieving Congress' objective of promoting competition in local telecommunications markets.[138] Using combinations of UNEs provides a competitor with the incentive and ability to package and market services in ways that differ from the BOCs' existing service offerings in order to compete in the local telecommunications market.[139] Moreover, combining the incumbent's UNEs with their own facilities encourages facilities-based competition and allows competing providers to provide a wide array of competitive choices.[140] Because the use of combinations of UNEs is an important strategy for entry into the local telecommunications market, as well as an obligation under the requirements of section 271, the Commission examines section 271 applications to determine whether competitive carriers are able to combine network elements as required by the Act and the Commission's regulations.[141]

3. Pricing of Network Elements

45. Checklist item 2 of section 271 states that a BOC must provide "nondiscriminatory access to network elements in accordance with sections 251(c)(3) and 252(d)(1)" of the Act.[142] Section 251(c)(3) requires incumbent LECs to provide "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory."[143] Section 252(d)(1) requires that a state commission's determination of the just and reasonable rates for network elements shall be based on the cost of providing the network elements, shall be nondiscriminatory, and may include a reasonable profit.[144] Pursuant to this statutory mandate, the Commission has determined that prices for UNEs must be based on the total element long run incremental cost (TELRIC) of providing those elements.[145] The Commission also promulgated rule 51.315(b), which prohibits incumbent LECs from separating already combined

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138 *Ameritech Michigan Order*, 12 FCC Rcd at 20718-19; *BellSouth South Carolina Order*, 13 FCC Rcd at 646.

139 *BellSouth South Carolina Order*, 13 FCC Rcd at 646; *see also Local Competition First Report and Order*, 11 FCC Rcd at 15666-68.

140 *Bell Atlantic New York Order*, 15 FCC Rcd at 4077-78, para. 230.

141 *Id.*

142 47 U.S.C. § 271(c)(2)(B)(ii).

143 *Id*. § 251(c)(3).

144 47 U.S.C. § 252(d)(1).

145 *Local Competition First Report and Order*, 11 FCC Rcd at 15844-46, paras. 674-79; 47 C.F.R. §§ 51.501 *et seq*.; *see also Deployment of Wireline Services Offering Advanced Telecommunications Capability, CC Docket No. 98-147, and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, CC Docket No. 96-98*, Third Report and Order and Fourth Report and Order, 14 FCC Rcd 20912, 20974, para. 135 (*Line Sharing Order*) (concluding that states should set the prices for line sharing as a new network element in the same manner as the state sets prices for other UNEs).

elements before providing them to competing carriers, except on request.[146] The Commission has previously held that it will not conduct a *de novo* review of a state's pricing determinations and will reject an application only if "basic TELRIC principles are violated or the state commission makes clear errors in factual findings on matters so substantial that the end result falls outside the range that the reasonable application of TELRIC principles would produce."[147]

46. Although the U.S. Court of Appeals for the Eighth Circuit stayed the Commission's pricing rules in 1996,[148] the Supreme Court restored the Commission's pricing authority on January 25, 1999, and remanded to the Eighth Circuit for consideration of the merits of the challenged rules.[149] On remand from the Supreme Court, the Eighth Circuit concluded that while TELRIC is an acceptable method for determining costs, certain specific requirements contained within the Commission's pricing rules were contrary to Congressional intent.[150] The Eighth Circuit has stayed the issuance of its mandate pending review by the Supreme Court.[151] Accordingly, the Commission's pricing rules remain in effect.

C. Checklist Item 3 – Poles, Ducts, Conduits and Rights of Way

47. Section 271(c)(2)(B)(iii) requires BOCs to provide "[n]ondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the [BOC] at just and reasonable rates in accordance with the requirements of section 224."[152] Section 224(f)(1) states that "[a] utility shall provide a cable television system or any telecommunications carrier with

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146 *See* 47 C.F.R. § 51.315(b).

147 *Bell Atlantic New York Order*, 15 FCC Rcd at 4084, para. 244; *SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6266, para. 59.

148 *Iowa Utils. Bd. v. FCC*, 120 F.3d 753, 800, 804, 805-06 (8th Cir. 1997).

149 *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). In reaching its decision, the Court acknowledged that section 201(b) "explicitly grants the FCC jurisdiction to make rules governing matters to which the 1996 Act applies." *Id.* at 380. Furthermore, the Court determined that section 251(d) also provides evidence of an express jurisdictional grant by requiring that "the Commission [shall] complete all actions necessary to establish regulations to implement the requirements of this section." *Id.* at 382. The Court also held that the pricing provisions implemented under the Commission's rulemaking authority do not inhibit the establishment of rates by the states. The Court concluded that the Commission has jurisdiction to design a pricing methodology to facilitate local competition under the 1996 Act, including pricing for interconnection and unbundled access, as "it is the States that will apply those standards and implement that methodology, determining the concrete result." *Id*.

150 *Iowa Utils. Bd. v. FCC*, 219 F.3d 744 (8th Cir. 2000), *petition for cert. granted sub nom. Verizon Communications v. FCC*, 121 S. Ct. 877 (2001).

151 *Iowa Utils. Bd. v. FCC*, No. 96-3321 *et al.* (8th Cir. Sept. 25, 2000).

152 47 U.S.C. § 271(c)(2)(B)(iii). As originally enacted, section 224 was intended to address obstacles that cable operators encountered in obtaining access to poles, ducts, conduits, or rights-of-way owned or controlled by utilities. The 1996 Act amended section 224 in several important respects to ensure that telecommunications carriers as well as cable operators have access to poles, ducts, conduits, or rights-of-way owned or controlled by utility companies, including LECs. *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20706, n.574.

nondiscriminatory access to any pole, duct, conduit, or right-of-way owned or controlled by it."[153] Notwithstanding this requirement, section 224(f)(2) permits a utility providing electric service to deny access to its poles, ducts, conduits, and rights-of-way, on a nondiscriminatory basis, "where there is insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes."[154] Section 224 also contains two separate provisions governing the maximum rates that a utility may charge for "pole attachments."[155] Section 224(b)(1) states that the Commission shall regulate the rates, terms, and conditions governing pole attachments to ensure that they are "just and reasonable."[156] Notwithstanding this general grant of authority, section 224(c)(1) states that "[n]othing in [section 224] shall be construed to apply to, or to give the Commission jurisdiction with respect to the rates, terms, and conditions, or access to poles, ducts, conduits and rights-of-way as provided in [section 224(f)], for pole attachments in any case where such matters are regulated by a State."[157] As of 1992, nineteen states, including Connecticut, had certified to the Commission that they regulated the rates, terms, and conditions for pole attachments.[158]

D. Checklist Item 4 – Unbundled Local Loops

48. Section 271(c)(2)(B)(iv) of the Act, item 4 of the competitive checklist, requires that a BOC provide "[l]ocal loop transmission from the central office to the customer's premises, unbundled from local switching or other services."[159] The Commission has defined the loop as a

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[153] 47 U.S.C. § 224(f)(1). Section 224(a)(1) defines "utility" to include any entity, including a LEC, that controls "poles, ducts, conduits, or rights-of-way used, in whole or in part, for any wire communications." 47 U.S.C. § 224(a)(1).

[154] 47 U.S.C. § 224(f)(2). In the *Local Competition First Report and Order*, the Commission concluded that, although the statutory exception enunciated in section 224(f)(2) appears to be limited to utilities providing electrical service, LECs should also be permitted to deny access to their poles, ducts, conduits, and rights-of-way because of insufficient capacity and for reasons of safety, reliability and generally applicable engineering purposes, provided the assessment of such factors is done in a nondiscriminatory manner. *Local Competition First Report and Order*, 11 FCC Rcd at 16080-81, paras. 1175-77.

[155] Section 224(a)(4) defines "pole attachment" as "any attachment by a cable television system or provider of telecommunications service to a pole, duct, conduit, or right-of-way owned or controlled by a utility." 47 U.S.C. § 224(a)(4).

[156] 47 U.S.C. § 224(b)(1).

[157] *Id*. § 224(c)(1). The 1996 Act extended the Commission's authority to include not just rates, terms, and conditions, but also the authority to regulate nondiscriminatory access to poles, ducts, conduits, and rights-of-way. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(f). Absent state regulation of terms and conditions of nondiscriminatory attachment access, the Commission retains jurisdiction. *Local Competition First Report and Order*, 11 FCC Rcd at 16104, para. 1232; 47 U.S.C. § 224(c)(1); *see also Bell Atlantic New York Order*, 15 FCC Rcd at 4093, para. 264.

[158] *See States That Have Certified That They Regulate Pole Attachments*, Public Notice, 7 FCC Rcd 1498 (1992); 47 U.S.C. § 224(f).

[159] 47 U.S.C. § 271(c)(2)(B)(iv).

transmission facility between a distribution frame, or its equivalent, in an incumbent LEC central office, and the demarcation point at the customer premises. This definition includes different types of loops, including two-wire and four-wire analog voice-grade loops, and two-wire and four-wire loops that are conditioned to transmit the digital signals needed to provide service such as ISDN, ADSL, HDSL, and DS1-level signals.[160]

49. In order to establish that it is "providing" unbundled local loops in compliance with checklist item 4, a BOC must demonstrate that it has a concrete and specific legal obligation to furnish loops and that it is currently doing so in the quantities that competitors demand and at an acceptable level of quality. A BOC must also demonstrate that it provides nondiscriminatory access to unbundled loops.[161] Specifically, the BOC must provide access to any functionality of the loop requested by a competing carrier unless it is not technically feasible to condition the loop facility to support the particular functionality requested. In order to provide the requested loop functionality, such as the ability to deliver xDSL services, the BOC may be required to take affirmative steps to condition existing loop facilities to enable competing carriers to provide services not currently provided over the facilities. The BOC must provide competitors with access to unbundled loops regardless of whether the BOC uses digital loop carrier (DLC) technology or similar remote concentration devices for the particular loops sought by the competitor.

50. On December 9, 1999, the Commission released the *Line Sharing Order*, which introduced new rules requiring BOCs to offer requesting carriers unbundled access to the high-frequency portion of local loops (HFPL).[162] HFPL is defined as "the frequency above the voiceband on a copper loop facility that is being used to carry traditional POTS analog circuit-switched voiceband transmissions." This definition applies whether a BOC's voice customers are served by cooper or by digital loop carrier equipment. Competing carriers should have access to the HFPL at either a central office or at a remote terminal. However, the HFPL network element is *only* available on a copper loop facility.[163]

51. To determine whether a BOC makes line sharing available consistent with Commission rules set out in the *Line Sharing Order*, the Commission examines categories of performance measurements identified in the Bell Atlantic New York and SWBT Texas Orders.

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[160] *Local Competition First Report and Order*, 11 FCC Rcd at 15691, para. 380; *UNE Remand Order*, 15 FCC Rcd at 3772-73, paras. 166-67, n.301 (retaining definition of the local loop from the *Local Competition First Report and Order*, but replacing the phrase "network interconnection device" with "demarcation point," and making explicit that dark fiber and loop conditioning are among the features, functions and capabilities of the loop).

[161] *SWBT Texas Order*, 15 FCC Rcd at 18481-81, para. 248; *Bell Atlantic New York Order*, 15 FCC Rcd at 4095, para. 269; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20637, para. 185.

[162] *See Line Sharing Order*, 14 FCC Rcd at 20924-27, paras. 20-27.

[163] *See Deployment of Wireline Services offering Advanced Telecommunications Capability and Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Third Report and Order on Reconsideration in CC Docket No. 98-147, Fourth Report and Order on Reconsideration in CC Docket No. 96-98, 16 FCC Rcd 2101, 2106-07, para. 10 (2001).

Specifically, a successful BOC applicant could provide evidence of BOC-caused missed installation due dates, average installation intervals, trouble reports within 30 days of installation, mean time to repair, trouble report rates, and repeat trouble report rates. In addition, a successful BOC applicant should provide evidence that its central offices are operationally ready to handle commercial volumes of line sharing and that it provides competing carriers with nondiscriminatory access to the pre-ordering and ordering OSS functions associated with the provision of line shared loops, including access to loop qualification information and databases.

52. Section 271(c)(2)(B)(iv) also requires that a BOC demonstrate that it makes line splitting available to competing carriers so that competing carriers may provide voice and data service over a single loop.[164] In addition, a BOC must demonstrate that a competing carrier, either alone or in conjunction with another carrier, is able to replace an existing UNE-P configuration used to provide voice service with an arrangement that enables it to provide voice and data service to a customer. To make such a showing, a BOC must show that it has a legal obligation to provide line splitting through rates, terms, and conditions in interconnection agreements and that it offers competing carriers the ability to order an unbundled xDSL-capable loop terminated to a collocated splitter and DSLAM equipment, and combine it with unbundled switching and shared transport.[165]

E. Checklist Item 5 – Unbundled Local Transport

53. Section 271(c)(2)(B)(v) of the competitive checklist requires a BOC to provide "[l]ocal transport from the trunk side of a wireline local exchange carrier switch unbundled from switching or other services."[166] The Commission has required that BOCs provide both dedicated and shared transport to requesting carriers.[167] Dedicated transport consists of BOC transmission facilities dedicated to a particular customer or carrier that provide telecommunications between wire centers owned by BOCs or requesting telecommunications carriers, or between switches owned by BOCs or requesting telecommunications carriers.[168] Shared transport consists of

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[164] *See generally SWBT Texas Order*, 15 FCC Rcd at 18515-17, paras. 323-329 (describing line splitting); 47 C.F.R. § 51.703(c) (requiring that incumbent LECs provide competing carriers with access to unbundled loops in a manner that allows competing carriers "to provide any telecommunications service that can be offered by means of that network element").

[165] *See SWBT Kansas/Oklahoma Order*, 16 FCC Rcd at 6348, para. 220.

[166] 47 U.S.C. § 271(c)(2)(B)(v).

[167] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20719, para. 201.

[168] *Id.* A BOC has the following obligations with respect to dedicated transport: (a) provide unbundled access to dedicated transmission facilities between BOC central offices or between such offices and serving wire centers (SWCs); between SWCs and interexchange carriers points of presence (POPs); between tandem switches and SWCs, end offices or tandems of the BOC, and the wire centers of BOCs and requesting carriers; (b) provide all technically feasible transmission capabilities such as DS1, DS3, and Optical Carrier levels that the competing carrier could use to provide telecommunications; (c) not limit the facilities to which dedicated interoffice transport facilities are connected, provided such interconnections are technically feasible, or restrict the use of unbundled transport facilities; and (d) to the extent technically feasible, provide requesting carriers with access to digital cross-connect (continued….)

transmission facilities shared by more than one carrier, including the BOC, between end office switches, between end office switches and tandem switches, and between tandem switches, in the BOC's network.[169]

F. Checklist Item 6 – Unbundled Local Switching

54. Section 271(c)(2)(B)(vi) of the 1996 Act requires a BOC to provide "[l]ocal switching unbundled from transport, local loop transmission, or other services."[170] In the *Second BellSouth Louisiana Order*, the Commission required BellSouth to provide unbundled local switching that included line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch.[171] The features, functions, and capabilities of the switch include the basic switching function as well as the same basic capabilities that are available to the incumbent LEC's customers.[172] Additionally, local switching includes all vertical features that the switch is capable of providing, as well as any technically feasible customized routing functions.[173]

55. Moreover, in the *Second BellSouth Louisiana Order*, the Commission required BellSouth to permit competing carriers to purchase UNEs, including unbundled switching, in a manner that permits a competing carrier to offer, and bill for, exchange access and the termination of local traffic.[174] The Commission also stated that measuring daily customer usage for billing purposes requires essentially the same OSS functions for both competing carriers and incumbent LECs, and that a BOC must demonstrate that it is providing equivalent access to billing information.[175] Therefore, the ability of a BOC to provide billing information necessary

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system functionality in the same manner that the BOC offers such capabilities to interexchange carriers that purchase transport services. *Id.* at 20719.

[169] *Id.* at 20719, n.650. The Commission also found that a BOC has the following obligations with respect to shared transport: (a) provide shared transport in a way that enables the traffic of requesting carriers to be carried on the same transport facilities that a BOC uses for its own traffic; (b) provide shared transport transmission facilities between end office switches, between its end office and tandem switches, and between tandem switches in its network; (c) permit requesting carriers that purchase unbundled shared transport and unbundled switching to use the same routing table that is resident in the BOC's switch; and (d) permit requesting carriers to use shared (or dedicated) transport as an unbundled element to carry originating access traffic from, and terminating traffic to, customers to whom the requesting carrier is also providing local exchange service. *Id.* at 20720, n.652.

[170] 47 U.S.C. § 271(c)(2)(B)(vi); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722. A switch connects end user lines to other end user lines, and connects end user lines to trunks used for transporting a call to another central office or to a long-distance carrier. Switches can also provide end users with "vertical features" such as call waiting, call forwarding, and caller ID, and can direct a call to a specific trunk, such as to a competing carrier's operator services.

[171] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20722, para. 207.

[172] *Id*.

[173] *Id.* at 20722-23, para. 207.

[174] *Id.* at 20723, para. 208.

[175] *Id.* at 20723, para. 208 (citing *Ameritech Michigan Order*, 12 FCC Rcd at 20619, para. 140).

for a competitive LEC to bill for exchange access and termination of local traffic is an aspect of unbundled local switching.[176] Thus, there is an overlap between the provision of unbundled local switching and the provision of the OSS billing function.[177]

56. To comply with the requirements of unbundled local switching, a BOC must also make available trunk ports on a shared basis and routing tables resident in the BOC's switch, as necessary to provide access to shared transport functionality.[178] In addition, a BOC may not limit the ability of competitors to use unbundled local switching to provide exchange access by requiring competing carriers to purchase a dedicated trunk from an interexchange carrier's point of presence to a dedicated trunk port on the local switch.[179]

G. Checklist Item 7 – 911/E911 Access and Directory Assistance/Operator Services

57. Section 271(c)(2)(B)(vii) of the Act requires a BOC to provide "[n]ondiscriminatory access to – (I) 911 and E911 services."[180] In the *Ameritech Michigan Order*, the Commission found that "section 271 requires a BOC to provide competitors access to its 911 and E911 services in the same manner that a BOC obtains such access, *i.e.*, at parity."[181] Specifically, the Commission found that a BOC "must maintain the 911 database entries for competing LECs with the same accuracy and reliability that it maintains the database entries for its own customers."[182] For facilities-based carriers, the BOC must provide "unbundled access to [its] 911 database and 911 interconnection, including the provision of dedicated trunks from the requesting carrier's switching facilities to the 911 control office at parity with what [the BOC] provides to itself."[183] Section 271(c)(2)(B)(vii)(II) and section 271(c)(2)(B)(vii)(III) require a BOC to provide nondiscriminatory access to "directory assistance services to allow the other carrier's customers to obtain telephone numbers" and "operator call completion services," respectively.[184] Section 251(b)(3) of the Act imposes on each LEC "the duty to permit all

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[176] *Id.*

[177] *Id.*

[178] *Id.* at 20723, para. 209 (citing the *Ameritech Michigan Order*, 12 FCC Rcd at 20705, para. 306).

[179] *Id.* (citing the *Ameritech Michigan Order*, 12 FCC Rcd at 20714-15, paras. 324-25).

[180] 47 U.S.C. § 271(c)(2)(B)(vii). 911 and E911 services transmit calls from end users to emergency personnel. It is critical that a BOC provide competing carriers with accurate and nondiscriminatory access to 911/E911 services so that these carriers' customers are able to reach emergency assistance. Customers use directory assistance and operator services to obtain customer listing information and other call completion services.

[181] *Ameritech Michigan Order*, 12 FCC Rcd at 20679, para. 256.

[182] *Id.*

[183] *Id.*

[184] 47 U.S.C. §§ 271(c)(2)(B)(vii)(II), (III).

[competing providers of telephone exchange service and telephone toll service] to have nondiscriminatory access to . . . operator services, directory assistance, and directory listing, with no unreasonable dialing delays."[185] The Commission concluded in the *Second BellSouth Louisiana Order* that a BOC must be in compliance with the regulations implementing section 251(b)(3) to satisfy the requirements of sections 271(c)(2)(B)(vii)(II) and 271(c)(2)(B)(vii)(III).[186] In the *Local Competition Second Report and Order*, the Commission held that the phrase "nondiscriminatory access to directory assistance and directory listings" means that "the customers of all telecommunications service providers should be able to access each LEC's directory assistance service and obtain a directory listing on a nondiscriminatory basis, notwithstanding: (1) the identity of a requesting customer's local telephone service provider; or (2) the identity of the telephone service provider for a customer whose directory listing is requested."[187] The Commission concluded that nondiscriminatory access to the dialing

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[185] *Id*. § 251(b)(3). The Commission implemented section 251(b)(3) in the *Local Competition Second Report and Order*. 47 C.F.R. § 51.217; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, Second Report and Order and Memorandum Opinion and Order, 11 FCC Rcd 19392 (1996) (*Local Competition Second Report and Order*) *vacated in part sub nom. People of the State of California v. FCC*, 124 F.3d 934 (8th Cir. 1997), *overruled in part*, *AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 366 (1999); *see also Implementation of the Telecommunications Act of 1996: Provision of Directory Listings Information under the Telecommunications Act of 1934*, Notice of Proposed Rulemaking, 14 FCC Rcd 15550 (1999) (*Directory Listings Information NPRM*).

[186] While both sections 251(b)(3) and 271(c)(2)(B)(vii)(II) refer to nondiscriminatory access to "directory assistance," section 251(b)(3) refers to nondiscriminatory access to "operator services," while section 271(c)(2)(B)(vii)(III) refers to nondiscriminatory access to "operator call completion services." 47 U.S.C. §§ 251(b)(3), 271(c)(2)(B)(vii)(III). The term "operator call completion services" is not defined in the Act, nor has the Commission previously defined the term. However, for section 251(b)(3) purposes, the term "operator services" was defined as meaning "any automatic or live assistance to a consumer to arrange for billing or completion, or both, of a telephone call." *Local Competition Second Report and Order*, 11 FCC Rcd at 19448, para. 110. In the same order the Commission concluded that busy line verification, emergency interrupt, and operator-assisted directory assistance are forms of "operator services," because they assist customers in arranging for the billing or completion (or both) of a telephone call. *Id.* at 19449, para. 111. All of these services may be needed or used to place a call. For example, if a customer tries to direct dial a telephone number and constantly receives a busy signal, the customer may contact the operator to attempt to complete the call. Since billing is a necessary part of call completion, and busy line verification, emergency interrupt, and operator-assisted directory assistance can all be used when an operator completes a call, the Commission concluded in the *Second BellSouth Louisiana Order* that for checklist compliance purposes, "operator call completion services" is a subset of or equivalent to "operator service." *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20740, n.763. As a result, the Commission uses the nondiscriminatory standards established for operator services to determine whether nondiscriminatory access is provided.

[187] 47 C.F.R. § 51.217(c)(3); *Local Competition Second Report and Order*, 11 FCC Rcd at 19456-58, paras. 130-35. The *Local Competition Second Report and Order*'*s* interpretation of section 251(b)(3) is limited "to access to each LEC's directory assistance service." *Id.* at 19456, para. 135. However, section 271(c)(2)(B)(vii) is not limited to the LEC's systems but requires "nondiscriminatory access to . . . directory assistance to allow the other carrier's customers to obtain telephone numbers." 47 U.S.C. § 271(c)(2)(B)(vii). Combined with the Commission's conclusion that "incumbent LECs must unbundle the facilities and functionalities providing operator services and directory assistance from resold services and other unbundled network elements to the extent technically feasible," *Local Competition First Report and Order*, 11 FCC Rcd at 15772-73, paras. 535-37, section 271(c)(2)(B)(vii)'s requirement should be understood to require the BOCs to provide nondiscriminatory access to the directory (continued….)

patterns of 4-1-1 and 5-5-5-1-2-1-2 to access directory assistance were technically feasible, and would continue.[188] The Commission specifically held that the phrase "nondiscriminatory access to operator services" means that "a telephone service customer, regardless of the identity of his or her local telephone service provider, must be able to connect to a local operator by dialing '0,' or '0 plus' the desired telephone number."[189]

58. Competing carriers may provide operator services and directory assistance by reselling the BOC's services, outsourcing service provision to a third-party provider, or using their own personnel and facilities. The Commission's rules require BOCs to permit competitive LECs wishing to resell the BOC's operator services and directory assistance to request the BOC to brand their calls.[190] Competing carriers wishing to provide operator services or directory assistance using their own or a third party provider's facilities and personnel must be able to obtain directory listings either by obtaining directory information on a "read only" or "per dip" basis from the BOC's directory assistance database, or by creating their own directory assistance database by obtaining the subscriber listing information in the BOC's database.[191] Although the Commission originally concluded that BOCs must provide directory assistance and operator services on an unbundled basis pursuant to sections 251 and 252, the Commission removed directory assistance and operator services from the list of required UNEs in the *UNE Remand Order*.[192] Checklist item obligations that do not fall within a BOC's obligations under section 251(c)(3) are not subject to the requirements of sections 251 and 252 that rates be based on forward-looking economic costs.[193] Checklist item obligations that do not fall within a BOC's

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assistance service provider selected by the customer's local service provider, regardless of whether the competitor; provides such services itself; selects the BOC to provide such services; or chooses a third party to provide such services. *See Directory Listings Information NPRM*.

188 *Local Competition Second Report and Order*, 11 FCC Rcd at 19464, para. 151.

189 *Id*. at 19464, para. 151.

190 47 C.F.R. § 51.217(d); *Local Competition Second Report and Order*, 11 FCC Rcd at 19463, para. 148. For example, when customers call the operator or calls for directory assistance, they typically hear a message, such as "thank you for using XYZ Telephone Company." Competing carriers may use the BOC's brand, request the BOC to brand the call with the competitive carriers name or request that the BOC not brand the call at all. 47 C.F.R. § 51.217(d).

191 47 C.F.R. § 51.217(C)(3)(ii); *Local Competition Second Report and Order*, 11 FCC Rcd at 19460-61, paras. 141-44; *Implementation of the Telecommunications Act of 1996: Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information, Implementation of the Local Competition Provisions of the Telecommunications Act of 1996, Provision of Directory Listing Information Under the Communications Act of 1934, as amended*, Third Report and Order, Second Order on Reconsideration, and Notice of Proposed Rulemaking, 14 FCC Rcd 15550, 15630-31, paras. 152-54 (1999); *Provision of Directory Listing Information Under the Communications Act of 1934, as amended*, First Report and Order, 16 FCC Rcd 2736, 2743-51 (2001).

192 *UNE Remand Order*, 15 FCC Rcd at 3891-92, paras. 441-42.

193 *UNE Remand Order*, 15 FCC Rcd at 3905, para. 470; *see generally* 47 U.S.C. §§ 251-52; *see also* 47 U.S.C. § 252(d)(1)(A)(i) (requiring UNE rates to be "based on the cost (determined without reference to a rate-of-return or other rate-based proceeding) of providing the … network element").

UNE obligations, however, still must be provided in accordance with sections 201(b) and 202(a), which require that rates and conditions be just and reasonable, and not unreasonably discriminatory.[194]

H. Checklist Item 8 – White Pages Directory Listings

59. Section 271(c)(2)(B)(viii) of the 1996 Act requires a BOC to provide "[w]hite pages directory listings for customers of the other carrier's telephone exchange service."[195] Section 251(b)(3) of the 1996 Act obligates all LECs to permit competitive providers of telephone exchange service and telephone toll service to have nondiscriminatory access to directory listing.[196]

60. In the *Second BellSouth Louisiana Order*, the Commission concluded that, "consistent with the Commission's interpretation of 'directory listing' as used in section 251(b)(3), the term 'white pages' in section 271(c)(2)(B)(viii) refers to the local alphabetical directory that includes the residential and business listings of the customers of the local exchange provider."[197] The Commission further concluded, "the term 'directory listing,' as used in this section, includes, at a minimum, the subscriber's name, address, telephone number, or any combination thereof."[198] The Commission's *Second BellSouth Louisiana Order* also held that a BOC satisfies the requirements of checklist item 8 by demonstrating that it: (1) provided nondiscriminatory appearance and integration of white page directory listings to competitive LECs' customers; and (2) provided white page listings for competitors' customers with the same accuracy and reliability that it provides its own customers.[199]

I. Checklist Item 9 – Numbering Administration

61. Section 271(c)(2)(B)(ix) of the 1996 Act requires a BOC to provide "nondiscriminatory access to telephone numbers for assignment to the other carrier's telephone

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194 *UNE Remand Order*, 15 FCC Rcd at 3905-06, paras. 470-73; *see also* 47 U.S.C. §§ 201(b), 202(a).

195 47 U.S.C. § 271(c)(2)(B)(viii).

196 *Id*. § 251(b)(3).

197 *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20748, para. 255.

198 *Id*. In the *Second BellSouth Louisiana Order*, the Commission stated that the definition of "directory listing" was synonymous with the definition of "subscriber list information." *Id.* at 20747 (citing the *Local Competition Second Report and Order*, 11 FCC Rcd at 19458-59). However, the Commission's decision in a later proceeding obviates this comparison, and supports the definition of directory listing delineated above. *See Implementation of the Telecommunications Carriers' Use of Customer Proprietary Network Information and Other Customer Information*, CC Docket No. 96-115, Third Report and Order; *Implementation of the Local Competition Provisions of the Telecommunications Act of 1996*, CC Docket No. 96-98, Second Order on Reconsideration; *Provision of Directory Listing Information under the Telecommunications Act of 1934, As Amended*, CC Docket No. 99-273, FCC 99-227, Notice of Proposed Rulemaking, para. 160 (rel. Sept. 9, 1999).

199 *Id.*

exchange service customers," until "the date by which telecommunications numbering administration, guidelines, plan, or rules are established."[200] The checklist mandates compliance with "such guidelines, plan, or rules" after they have been established.[201] A BOC must demonstrate that it adheres to industry numbering administration guidelines and Commission rules.[202]

J. Checklist Item 10 – Databases and Associated Signaling

62. Section 271(c)(2)(B)(x) of the 1996 Act requires a BOC to provide "nondiscriminatory access to databases and associated signaling necessary for call routing and completion."[203] In the *Second BellSouth Louisiana Order*, the Commission required BellSouth to demonstrate that it provided requesting carriers with nondiscriminatory access to: "(1) signaling networks, including signaling links and signaling transfer points; (2) certain call-related databases necessary for call routing and completion, or in the alternative, a means of physical access to the signaling transfer point linked to the unbundled database; and (3) Service Management Systems (SMS)."[204] The Commission also required BellSouth to design, create, test, and deploy Advanced Intelligent Network (AIN) based services at the SMS through a Service Creation Environment (SCE).[205] In the *Local Competition First Report and Order*, the Commission defined call-related databases as databases, other than operations support systems, that are used in signaling networks for billing and collection or the transmission, routing, or other provision of telecommunications service.[206] At that time the Commission required incumbent LECs to provide unbundled access to their call-related databases, including but not limited to: the Line Information Database (LIDB), the Toll Free Calling database, the Local Number Portability database, and Advanced Intelligent Network databases.[207] In the *UNE Remand Order*, the Commission clarified that the definition of call-related databases "includes,

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[200] 47 U.S.C. § 271(c)(2)(B)(ix).

[201] *Id.*

[202] *See Second Bell South Louisiana Order*, 13 FCC Rcd at 20752; *see also Numbering Resource Optimization*, Report and Order and Further Notice of Proposed Rulemaking, 15 FCC Rcd 7574 (2000); *Numbering Resource Optimization*, Second Report and Order, Order on Reconsideration in CC Docket No. 99-200 and Second Further Notice of Proposed Rulemaking in CC Docket No. 99-200, CC Docket Nos. 96-98; 99-200 (rel. Dec. 29, 2000); *Numbering Resource Optimization*, Third Report and Order and Second Order on Reconsideration in CC Docket No. 96-98 and CC Docket No. 99-200 (rel. Dec. 28, 2001).

[203] 47 U.S.C. § 271(c)(2)(B)(x).

[204] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20753, para. 267.

[205] *Id.* at 20755-56, para. 272.

[206] *Local Competition First Report and Order*, 11 FCC Rcd at 15741, n.1126; *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

[207] *Id*. at 15741-42, para. 484.

but is not limited to, the calling name (CNAM) database, as well as the 911 and E911 databases."[208]

K. Checklist Item 11 – Number Portability

63. Section 271(c)(2)(B) of the 1996 Act requires a BOC to comply with the number portability regulations adopted by the Commission pursuant to section 251.[209] Section 251(b)(2) requires all LECs "to provide, to the extent technically feasible, number portability in accordance with requirements prescribed by the Commission."[210] The 1996 Act defines number portability as "the ability of users of telecommunications services to retain, at the same location, existing telecommunications numbers without impairment of quality, reliability, or convenience when switching from one telecommunications carrier to another."[211] In order to prevent the cost of number portability from thwarting local competition, Congress enacted section 251(e)(2), which requires that "[t]he cost of establishing telecommunications numbering administration arrangements and number portability shall be borne by all telecommunications carriers on a competitively neutral basis as determined by the Commission."[212] Pursuant to these statutory provisions, the Commission requires LECs to offer interim number portability "to the extent technically feasible."[213] The Commission also requires LECs to gradually replace interim number portability with permanent number portability.[214] The Commission has established guidelines for states to follow in mandating a competitively neutral cost-recovery mechanism for

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208 *UNE Remand Order*, 15 FCC Rcd at 3875, para. 403.

209 47 U.S.C. § 271(c)(2)(B)(xii).

210 *Id.* at § 251(b)(2).

211 *Id.* at § 153(30).

212 *Id.* at § 251(e)(2); *see also Second BellSouth Louisiana Order*, 13 FCC Rcd at 20757, para. 274; *In the Matter of Telephone Number Portability*, Third Report and Order, 13 FCC Rcd 11701, 11702-04 (1998) (*Third Number Portability Order*); *In the Matter of Telephone Number Portability*, Fourth Memorandum Opinion and Order on Reconsideration, 15 FCC Rcd 16459, 16460, 16462-65, paras. 1, 6-9 (1999) (*Fourth Number Portability Order*).

213 *Fourth Number Portability Order*, 15 FCC Rcd at 16465, para. 10; *Telephone Number Portability*, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 8352, 8409-12, paras. 110-16 (1996) (*First Number Portability Order*); *see also* 47 U.S.C. § 251(b)(2).

214 *See* 47 C.F.R. §§ 52.3(b)-(f); *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8355, 8399-8404, paras. 3, 91; *Third Number Portability Order*, 13 FCC Rcd at 11708-12, paras. 12-16.

interim number portability,[215] and created a competitively neural cost-recovery mechanism for long-term number portability.[216]

L. Checklist Item 12 – Local Dialing Parity

64. Section 271(c)(2)(B)(xii) requires a BOC to provide "[n]ondiscriminatory access to such services or information as are necessary to allow the requesting carrier to implement local dialing parity in accordance with the requirements of section 251(b)(3)."[217] Section 251(b)(3) imposes upon all LECs "[t]he duty to provide dialing parity to competing providers of telephone exchange service and telephone toll service with no unreasonable dialing delays."[218] Section 153(15) of the Act defines "dialing parity" as follows:

> [A] person that is not an affiliate of a local exchange carrier is able to provide telecommunications services in such a manner that customers have the ability to route automatically, without the use of any access code, their telecommunications to the telecommunications services provider of the customer's designation.[219]

65. The rules implementing section 251(b)(3) provide that customers of competing carriers must be able to dial the same number of digits the BOC's customers dial to complete a local telephone call.[220] Moreover, customers of competing carriers must not otherwise suffer inferior quality service, such as unreasonable dialing delays, compared to the BOC's customers.[221]

M. Checklist Item 13 – Reciprocal Compensation

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[215] *See* 47 C.F.R. § 52.29; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *First Number Portability Order*, 11 FCC Rcd at 8417-24, paras. 127-40.

[216] *See* 47 C.F.R. §§ 52.32, 52.33; *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20758, para. 275; *Third Number Portability Order*, 13 FCC Rcd at 11706-07, para. 8; *Fourth Number Portability Order* at 16464-65, para. 9.

[217] Based on the Commission's view that section 251(b)(3) does not limit the duty to provide dialing parity to any particular form of dialing parity (*i.e.*, international, interstate, intrastate, or local), the Commission adopted rules in August 1996 to implement broad guidelines and minimum nationwide standards for dialing parity. *Local Competition Second Report and Order*, 11 FCC Rcd at 19407; *Interconnection Between Local Exchange Carriers and Commercial Mobile Radio Service Providers*, CC Docket No. 95-185, Further Order On Reconsideration, FCC 99-170 (rel. July 19, 1999).

[218] 47 U.S.C. § 251(b)(3).

[219] *Id.* § 153(15).

[220] 47 C.F.R §§ 51.205, 51.207.

[221] *See* 47 C.F.R. § 51.207 (requiring same number of digits to be dialed); *Local Competition Second Report and Order*, 11 FCC Rcd at 19400, 19403.

66. Section 271(c)(2)(B)(xiii) of the Act requires that a BOC enter into "[r]eciprocal compensation arrangements in accordance with the requirements of section 252(d)(2)."[222] In turn, pursuant to section 252(d)(2)(A), "a state commission shall not consider the terms and conditions for reciprocal compensation to be just and reasonable unless (i) such terms and conditions provide for the mutual and reciprocal recovery by each carrier of costs associated with the transport and termination on each carrier's network facilities of calls that originate on the network facilities of the other carrier; and (ii) such terms and conditions determine such costs on the basis of a reasonable approximation of the additional costs of terminating such calls."[223]

N. Checklist Item 14 – Resale

67. Section 271(c)(2)(B)(xiv) of the Act requires a BOC to make "telecommunications services . . . available for resale in accordance with the requirements of sections 251(c)(4) and 252(d)(3)."[224] Section 251(c)(4)(A) requires incumbent LECs "to offer for resale at wholesale rates any telecommunications service that the carrier provides at retail to subscribers who are not telecommunications carriers."[225] Section 252(d)(3) requires state commissions to "determine wholesale rates on the basis of retail rates charged to subscribers for the telecommunications service requested, excluding the portion thereof attributable to any marketing, billing, collection, and other costs that will be avoided by the local exchange carrier."[226] Section 251(c)(4)(B) prohibits "unreasonable or discriminatory conditions or limitations" on service resold under section 251(c)(4)(A).[227] Consequently, the Commission concluded in the *Local Competition First Report and Order* that resale restrictions are presumed to be unreasonable unless the LEC proves to the state commission that the restriction is reasonable and nondiscriminatory.[228] If an incumbent LEC makes a service available only to a specific category of retail subscribers, however, a state commission may prohibit a carrier that obtains the service pursuant to section 251(c)(4)(A) from offering the service to a different category of subscribers.[229] If a state creates such a limitation, it must do so consistent with

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222 47 U.S.C. § 271(c)(2)(B)(xiii).

223 *Id*. § 252(d)(2)(A).

224 *Id*. § 271(c)(2)(B)(xiv).

225 *Id*. § 251(c)(4)(A).

226 *Id*. § 252(d)(3).

227 *Id*. § 251(c)(4)(B).

228 *Local Competition First Report and Order*, 11 FCC Rcd at 15966, para. 939; 47 C.F.R. § 51.613(b). The Eighth Circuit acknowledged the Commission's authority to promulgate such rules, and specifically upheld the sections of the Commission's rules concerning resale of promotions and discounts in *Iowa Utilities Board*. *Iowa Utils. Bd. v. FCC*, 120 F.3d at 818-19, *aff'd in part and remanded on other grounds*, *AT&T v. Iowa Utils. Bd.*, 525 U.S. 366 (1999). *See also* 47 C.F.R. §§ 51.613-51.617.

229 47 U.S.C. § 251(c)(4)(B).

requirements established by the Federal Communications Commission.[230] In accordance with sections 271(c)(2)(B)(ii) and 271(c)(2)(B)(xiv), a BOC must also demonstrate that it provides nondiscriminatory access to operations support systems for the resale of its retail telecommunications services.[231] The obligations of section 251(c)(4) apply to the retail telecommunications services offered by a BOC's advanced services affiliate.[232]

V. COMPLIANCE WITH SEPARATE AFFILIATE REQUIREMENTS – SECTION 272

68. Section 271(d)(3)(B) requires that the Commission shall not approve a BOC's application to provide interLATA services unless the BOC demonstrates that the "requested authorization will be carried out in accordance with the requirements of section 272."[233] The Commission set standards for compliance with section 272 in the *Accounting Safeguards Order* and the *Non-Accounting Safeguards Order*.[234] Together, these safeguards discourage and facilitate the detection of improper cost allocation and cross-subsidization between the BOC and its section 272 affiliate.[235] In addition, these safeguards ensure that BOCs do not discriminate in favor of their section 272 affiliates.[236]

69. As the Commission stated in the *Ameritech Michigan Order*, compliance with section 272 is "of crucial importance" because the structural, transactional, and nondiscrimination safeguards of section 272 seek to ensure that BOCs compete on a level

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230 *Id.*

231 *See, e.g.*, *Bell Atlantic New York Order*, 15 FCC Rcd at 4046-48, paras. 178-81 (Bell Atlantic provides nondiscriminatory access to its OSS ordering functions for resale services and therefore provides efficient competitors a meaningful opportunity to compete).

232 *See Verizon Connecticut Order*, 16 FCC Rcd 14147, 14160-63, paras. 27-33 (2001); *Association of Communications Enterprises v. FCC*, 235 F.3d 662 (D.C. Cir. 2001).

233 47 U.S.C. § 271(d)(3)(B).

234 *See Implementation of the Accounting Safeguards Under the Telecommunications Act of 1996*, CC Docket No. 96-150, Report and Order, 11 FCC Rcd 17539 (1996) (*Accounting Safeguards Order*), Second Order On Reconsideration, FCC 00-9 (rel. Jan. 18, 2000); *Implementation of the Non-Accounting Safeguards of Sections 271 and 272 of the Communications Act of 1934, as amended*, CC Docket No. 96-149, First Report and Order and Further Notice of Proposed Rulemaking, 11 FCC Rcd 21905 (1996) (*Non-Accounting Safeguards Order*), *petition for review pending sub nom. SBC Communications v. FCC*, No. 97-1118 (filed D.C. Cir. Mar. 6, 1997) (held in abeyance May 7, 1997), First Order on Reconsideration, 12 FCC Rcd 2297 (1997) (*First Order on Reconsideration*), Second Order on Reconsideration, 12 FCC Rcd 8653 (1997) (*Second Order on Reconsideration*), *aff'd sub nom. Bell Atlantic Telephone Companies v. FCC*, 131 F.3d 1044 (D.C. Cir. 1997), Third Order on Reconsideration, FCC 99-242 (rel. Oct. 4, 1999) (*Third Order on Reconsideration*).

235 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914; *Accounting Safeguards Order*, 11 FCC Rcd at 17550; *Ameritech Michigan Order*, 12 FCC Rcd at 20725.

236 *Non-Accounting Safeguards Order*, 11 FCC Rcd at 21914, paras. 15-16; *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346.

playing field.[237] The Commission's findings regarding section 272 compliance constitute independent grounds for denying an application.[238] Past and present behavior of the BOC applicant provides "the best indicator of whether [the applicant] will carry out the requested authorization in compliance with section 272."[239]

VI. COMPLIANCE WITH THE PUBLIC INTEREST – SECTION 271(D)(3)(C)

70. In addition to determining whether a BOC satisfies the competitive checklist and will comply with section 272, Congress directed the Commission to assess whether the requested authorization would be consistent with the public interest, convenience, and necessity.[240] Compliance with the competitive checklist is itself a strong indicator that long distance entry is consistent with the public interest. This approach reflects the Commission's many years of experience with the consumer benefits that flow from competition in telecommunications markets.

71. Nonetheless, the public interest analysis is an independent element of the statutory checklist and, under normal canons of statutory construction, requires an independent determination.[241] Thus, the Commission views the public interest requirement as an opportunity to review the circumstances presented by the application to ensure that no other relevant factors exist that would frustrate the congressional intent that markets be open, as required by the competitive checklist, and that entry will therefore serve the public interest as Congress expected. Among other things, the Commission may review the local and long distance markets to ensure that there are not unusual circumstances that would make entry contrary to the public interest under the particular circumstances of the application at issue.[242] Another factor that could be relevant to the analysis is whether the Commission has sufficient assurance that markets will remain open after grant of the application. While no one factor is dispositive in this analysis, the overriding goal is to ensure that nothing undermines the conclusion, based on the Commission's analysis of checklist compliance, that markets are open to competition.

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[237] *Ameritech Michigan Order*, 12 FCC Rcd at 20725, para. 346; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402.

[238] *Second BellSouth Louisiana Order*, 13 FCC Rcd at 20785-86, para. 322; *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402.

[239] *Bell Atlantic New York Order*, 15 FCC Rcd at 4153, para. 402.

[240] 47 U.S.C. § 271(d)(3)(C).

[241] In addition, Congress specifically rejected an amendment that would have stipulated that full implementation of the checklist necessarily satisfies the public interest criterion. *See Ameritech Michigan Order*, 12 FCC Rcd at 20747 at para. 360-66; *see also* 141 Cong. Rec. S7971, S8043 (June. 8, 1995).

[242] *See Second BellSouth Louisiana Order*, 13 FCC Rcd at 20805-06, para. 360 (the public interest analysis may include consideration of "whether approval . . . will foster competition in all relevant telecommunications markets").

Separate Statement of
Commissioner Michael J. Copps,
Concurring

Re: Application by Verizon New England, Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks, Inc., and Verizon Select Services Inc., for Authorization to Provide In-Region InterLATA Services in Rhode Island (CC Docket No. 01-324)

I write separately to explain the reasons that I concur in this Order granting Verizon's application to provide long-distance services in Rhode Island. One of the principal objectives of the Telecommunications Act of 1996 is to promote competition in all telecommunications markets. At the core of this effort is section 271, pursuant to which Bell companies could enter the long-distance market, but only after they have opened their local markets to competition. In my evaluation of section 271 applications, I have voted to grant certain applications and to deny others, ever mindful of Congress' directive that a Bell company must meet all the checklist items, and that the grant of an application must serve the public interest.

Verizon has done a great deal to open its local markets to competition in Rhode Island. I also commend the Rhode Island Commission for its significant efforts to ensure competition in its local markets. Indeed, several problems at issue in prior applications were not raised by commenters here. The major issue in this proceeding has been the pricing of network elements. Parties raised serious concerns about both the original rates adopted in Rhode Island and reduced rates implemented in November prior to the filing of this application. As the Order indicates, the Commission "strongly question[s]" whether the original rates complied with the statutory requirements.

This Order, however, grants Verizon a waiver of our rules and accepts new rate reductions filed by Verizon on day 80 of the 90-day statutory period. The Order permits Verizon to prove compliance with the checklist by comparing these reduced rates to those adopted by the New York Commission on January 28. I am pleased that Verizon reduced its prices to levels in line with the corrected New York rates. I further support the clear statement in this Order that "it would be inappropriate to evaluate Verizon's Rhode Island rates based on a benchmark comparison to superseded New York rates." As I indicated in my dissent to the *Verizon Pennsylvania* Order, I do not believe that this Commission should evaluate rates in one state based on prices in another state – in that instance as well, New York -- that had been called into question by an Administrative Law Judge and that the state commission was in the process of revising. Nonetheless, I only concur in this decision, because these last-minute rate changes might not have been necessary had the Commission not previously indicated its willingness to allow comparisons to such outdated rates.

I am further troubled by the waiver of our procedural rules barring late-filed information. Since the first application, this Commission has stated, and reiterated numerous times, that an application must be complete on the date it is filed. This rule is critical to a fair and orderly

process. Reaching a decision within 90 days in a proceeding that involves an enormous record and numerous complex issues would be difficult, if not impossible, if we are faced with a moving target. Such late-filed evidence prejudices the ability of other parties, the Department of Justice, and the relevant State commission to evaluate an application. Yet, time and again, this Commission waives this procedural rule.

Although I am troubled by the extent to which we accept late-filed information, in this instance, I concur due to the unique circumstances present here. Verizon lowered its rates in response to a decision in a neighboring state that occurred during the pendency of the application. Thus, as the Order indicates, Verizon could not have known the timing of the New York decision nor the exact rates that would be adopted. This is different than the situation in which a party withholds evidence to game the process.

Due to these extenuating circumstances, I concur in the extraordinary step of granting a waiver. Notwithstanding our limited decision here, I believe the Commission should state firmly that the strong presumption is that late-filed information will not be accepted and that the bar for a waiver will be set high. The section 271 process is central to Congress' statutory framework. Allowing companies to violate our procedural rules without penalty is tantamount to shirking our responsibility to implement the law Congress gave us.

STATEMENT OF
COMMISSIONER KEVIN J . MARTIN, APPROVING IN PART AND CONCURRING IN PART

Re: *Application by Verizon New England Inc., Bell Atlantic Communications, Inc. (d/b/a Verizon Long Distance), NYNEX Long Distance Company (d/b/a Verizon Enterprise Solutions), Verizon Global Networks Inc., and Verizon Select Services Inc., for Authorization To Provide In-Region, InterLATA Services in Rhode Island*, Memorandum Opinion and Order, CC Docket No. 01-324

Today we grant Verizon authority to provide in-region, interLATA service originating in the State of Rhode Island. I am pleased to support this Order and commend the Rhode Island Public Utilities Commission, Verizon, and this Commission's staff for their hard work.

Nevertheless, I concur in this Order because of concerns I have with two issues: application of our complete-as-filed requirement and observations concerning the validity of superseded rates that are no longer at issue in this proceeding.

The complete-as-filed requirement provides that "when an applicant files new information after the comment date, the Commission reserves the right to start the 90-day review period again or to accord such information no weight." *Joint Application by SBC Communications Inc., Southwestern Bell Tel. Co., and Southwestern Bell Communications Services, Inc., d/b/a Southwestern Bell Long Distance for Provision of In-Region, InterLATA Services in Kansas and Oklahoma*, Memorandum Opinion and Order, 16 FCC Rcd 6237, 6247 ¶ 21 (2001), *aff'd in part*, *remanded in part sub nom. Sprint Communications Co. v. FCC*, 274 F.3d 549 (D.C. Cir. 2001). Here, based on truly unique circumstances, we waive the complete-as-filed requirement and rely on data filed by the applicant well after the comment date.

The unique circumstances at issue arise because a core element of Verizon's evidence in support of its section 271 application changed outside of its control. When Verizon filed its application, it relied on UNE rates in Rhode Island – described in the Order as the "April 11 rates" – that Verizon supported based on a benchmark with rates then in effect in New York. On day 63 of our review, however, the New York Public Service Commission altered Verizon's rates, among other things lowering Verizon's New York switching rate by approximately 50 percent. Commenters urged Verizon to use the new New York switching rate as a benchmark, and Verizon submitted new Rhode Island rates that did so. Commenters were then given an opportunity – albeit a brief one – to comment on Verizon's limited rate changes, which were consistent with what many of them had advocated.

I wish to emphasize that, absent the kind of extremely unique circumstances at issue here, the Commission should avoid relying on late-filed information. We have begun to take such information into account with more frequency, and I fear that we may be moving in the wrong direction. In particular, I am concerned that relying on this information may burden commenters – particularly those opposing an application. Commenters need adequate time to evaluate and analyze new information, especially if it affects significant aspects of an application. When we accept late-filed information, we create additional burdens for them.

In my view, we would be better served by emphasizing the importance of having all of an applicant's supporting information in the record when the application is filed rather than granting the waivers that have become more frequent recently. While I acknowledge that any rule will probably necessitate some exceptions, we can and should make significant improvements in this area.

Also troubling to me are this Order's observations concerning Verizon's superseded April 11 rates. As explained above, the Order grants Verizon's 271 application based on new rates, which we find valid under a benchmark comparison with the rates recently established by the New York Public Service Commission. Although this analysis definitively resolves the issue of the validity of Verizon's rates, the Order also makes several observations about the validity of the superseded April 11 rates, suggesting that several of them were "questionable."

In my view, this dicta is unnecessary. Once the Commission concludes that a section 271 application meets the statutory requirements, the Commission should not offer dicta on a different set of rates no longer before it. I believe that such observations extend the Commission beyond a proper adjudicatory role and suggest limitations on states conducting their own rate proceedings. States should have the opportunity to have their rate decisions judged on a clean slate, without the burden of such disapproving dicta.

For these reasons, I concur in this Order.